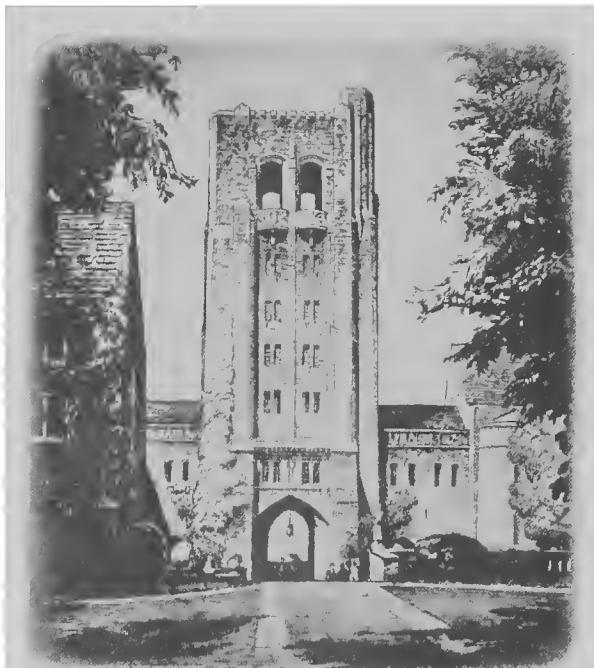


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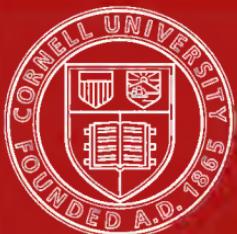
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THE ELEMENTS
OF THE
LAW OF SALE
OF
PERSONAL PROPERTY

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TO MY FATHER

PREFACE.

The following presentation of the elements of the law of sales of personal property has been prepared by the author in connection with instruction upon the subject as given to law school students. It is an attempt to present in a compact yet elementary way all the leading topics of this most important subdivision of the law of contracts, and the need of the student has been the controlling thought. While no pretensions to an extensive treatise are made, nevertheless, all the essential questions connected with the subject have been referred to, and all that one requires for a general knowledge of the elements of the subject has, it is believed, been called to his attention herein. The author has not hesitated to express his own opinions in the discussion of various theories connected with this branch of the law. It is hoped, however, that the endeavor to maintain a clearness in statement has been reasonably successful.

The topic of "Remedies" has been treated somewhat more fully than in other works of this character, and a synopsis of the more important principles relating to damages, in connection therewith, has been introduced, which will prove, it is also hoped, a welcome aid.

In the Appendix there is given, among other things, the text of the recent (1893) English Sale of Goods Act, which is, in itself, a most valuable outline of the law of sales, since the act is, substantially, a codification of the principles of the common law upon the subject.

The plan of the book is to call attention to the principles, referring the student, in connection with the discussion thereof, to the illustrative cases which have been made a part of the main text, rather than cited in footnotes. It would have been an easy matter to have largely increased the number of cited cases, but those mentioned have been carefully selected, and, if they are read in connection with the text, they will thoroughly cover the subject. In fact, one object of the present work is to encourage and emphasize the importance of case-reading, and in selecting the cases the limitations of many law libraries have been kept in mind; for it is better, the author believes, that the student consult, if possible, the reports themselves, since he thereby develops the habit of such reading, and also acquires a familiarity with such authorities at first hand.

Wm. L. BURDICK.

THE UNIVERSITY OF KANSAS,
March, 1901.

LIST OF AUTHORITIES AND TEXT-BOOKS

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THE LAW OF SALES.

	A. D. —
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Baker (J. F.), Law of Sales as Affected by the Statute of Frauds	1887
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ELEMENTS
OF
THE LAW OF SALES.

§ 1. *Definition:*

A SALE OF PERSONAL PROPERTY IS A CONTRACT TRANSFERRING THE GENERAL PROPERTY IN A THING FOR A PRICE CONSISTING OF A SUM OF MONEY OR MONEY'S WORTH.

The limited scope of the present work prevents discussion of the many, and irreconcilable, definitions of a sale that have been laid down by the text-writers and the courts. We call attention, however, to some things which many of the definitions either ignore or else improperly include. In the first place, a sale is a *contract*, and, therefore, subject to all the general principles of law relating to contracts. The mere transfer of a chattel, it should be further noted, is not a sale, nor is a contract to transfer a chattel a sale, although some of the definitions so imply. Moreover, sale is often confused with barter, from which it may be important, at times, to legally distinguish a sale, despite the fact that, historically, all voluntary transfers of chattels were, originally, of the nature of barter, or of gift. To constitute a sale the *general property* in the thing is transferred, rather than the thing itself, and it is transferred for a price measured in money or money's worth, as a *sum*. To

transfer a chattel for a *particular* coin or “bill,” the coin itself, or the bill, being desired on account of its rarity or association, as (say) to transfer a book for a rare coin (the *thing* and not the mere amount of money being the consideration), is not a sale, but an exchange, or barter. A sale implies a price in a *sum* of money, a measure of value, and not the mere fact that a *piece* of money, as a chattel, was transferred in return. Again, a contract *to* sell, that is, *in futuro*, is no more a sale than a contract to marry (*in futuro*) is a marriage. The contract *to* sell is merely executory. No title passes in such a contract, and the actual sale may never take place. Nevertheless, contracts to sell are so intimately associated with contracts of sale that the law relating to such executory contracts is necessarily involved in the law relating to sales, and such contracts must be duly considered in any general discussion of our subject.

To sum up, a contract which, of itself, *transfers* the *general property* in a chattel for a *sum of money*, or money’s worth, as a price, is a sale, or, as often called, “a bargain and sale.”

§ 2. *Sales and Kindred Contracts:*

As stated in the preceding section, sales are often confused with other transactions which, in some of their features, resemble, more or less, contracts of sale. It is important, however, to distinguish sales from such other transactions, since principles relating to sales do not, necessarily, relate to them, and, often, the rules of law governing such other transactions are entirely different from, or else have no connection with, the law of sales. Again, a *statute* relating to *sales* alone would not include a bailment or an exchange, and, as stated before, if a cer-

tain transaction proves to be merely a contract *to sell*, rather than a sale, no property has passed, and the rights and liabilities of the parties are therefore materially affected. The following cases, in which sales are thus distinguished from partially similar transactions, may be examined with profit.

Sales Differ From—

a. Contracts to Sell in the Future:

Groat et al. v. Gile, 51 N. Y. 431.
Cunningham v. Ashbrook, 20 Mo. 553.
Lester v. East, 49 Ind. 588.
Kost v. Reilly, 62 Conn. 57.

b. Bailments:

Irons v. Kentner, 51 Iowa, 88, 50 N. W. R. 73.
Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99.
State v. Stockman (Oreg.), 46 Pac. R. 851.

c. Consignments:

Meldrum v. Show, 9 Pick. 441.
Conable v. Lynch, 45 Iowa, 84.
Reno v. Milling Co., 53 Kan. 255.

d. Exchanges or Barter:

Redfield v. Tegg, 38 N. Y. 212.
Stevenson v. State, 65 Ind. 409.
Com. v. Abrams, 150 Mass. 393.

e. Gifts:

Picksley v. Starr, 149 N. Y. 482.
Cook v. Lum, 55 N. J. L. 373.

f. Leases:

Smith v. Niles, 20 Vt. 315.
Murch v. Wright, 46 Ill. 487.
Powell v. Ecker, 96 Mich. 538.
Hine v. Roberts, 48 Conn. 267.

g. Mortgages:

Susman v. Whyard, 149 N. Y. 127.
Damm v. Mason, 98 Mich. 237.
White v. Megill (N. J. Eq.), 18 Atl. R. 355.
Cole v. Bolard, 22 Pa. St. 431.

h. Pledges:

Atwater v. Mower, 10 Vt. 75.
Parshall v. Eggart, 52 Barb. 367.
Brown v. Bement, 8 Johns. 96.
Lenz v. Harrison, 148 Ill. 598.
Roberts v. Norton, 66 Conn. 1.

PART I.

FORMATION OF THE CONTRACT.

§ 3. Since a sale is a contract, the elementary principles that belong to all contracts are involved in the consideration of the subject. We will discuss the formation of the contract, first, under the rules of common law, and secondly, under the requirements connected with the Statute of Frauds.

A. BY COMMON LAW.

1. PARTIES TO THE CONTRACT.

a. *The Seller or Vendor.*

§ 4. While the general rule is that only the legal owner can sell, there are to this statement important exceptions, which may be classified as follows:

- (1) Sales in open market ("market overt").
- (2) Sales of negotiable securities.
- (3) Sales of pledges or pawns.
- (4) Sales by sheriffs, etc.
- (5) Sales by master of a ship.
- (6) Sales by factors or commission merchants.
- (7) Sales by auctioneers and other agents.

§ 5. *Market Overt:*

In England, a sale made in open market conveys, as a general rule, to an innocent purchaser, a valid title, although the vendor has no legal title to the goods. The rule does not obtain in the United States, however.

Ventress v. Smith, 10 Pet. 176.

Fawcett v. Osborne, 32 Ill. 425.

§ 6. *Negotiable Securities:*

The needs of business and commerce require that negotiable paper, like currency, should pass from hand to hand, when properly indorsed, or when payable to bearer. Consequently the innocent purchaser, for value, before maturity, acquires a good title although the previous holder may not have been the lawful owner.

Swift v. Tyson, 16 Pet. 1.

Seybel v. National Currency Bank, 54 N. Y. 288.

Tiedeman on Bills and Notes, § 93 *et seq.*

§ 7. *Pledges:*

The pledgee may, at common law, upon the default of the pledgor, sell the pledge or pawn at public sale.

Stearns v. Marsh, 4 Denio, 227.

Bryan v. Baldwin, 52 N. Y. 233.

Stevens v. Hurlbut Bank, 31 Conn. 146.

See Schouler on Bailments, § 226 *et seq.*

§ 8. *Sheriff's Sales:*

These sales are variously called judicial sales, forced sales, involuntary sales, public sales and execution sales. Between execution sales and judicial sales there is, however, a distinction. The former is, at common law, made under the authority of a writ of *fieri facias* ("that you cause to be made" out of the goods or lands the amount of the claim), which directs the officer to seize and sell the property of the execution debtor for the satisfaction of the judgment. A judicial sale is one in which *specific* property is sold under process of a court of competent jurisdiction, being a judgment *in rem*. Judicial sales are held not to be within the Statute of Frauds, although execution sales are.

Blagden v. Bradbear, 12 Ves. 446.

These official sales are all more or less governed by statutes, and the formalities must be carefully observed.

Chambers v. Jones, 72 Ill. 275.

Purchasers at such sales are protected when power to sell is expressly given.

Gray v. Brignardello, 1 Wall. 634.

Osterman v. Baldwin, 6 Wall. 122.

The subject of judicial sales, however, is a separate branch of the law, and the student is referred to the special text-books upon the topic. For illustrations of *void* judicial sales, see

Bartholomew v. Warren, 32 Conn. 102.

Caldwell v. Walters, 18 Pa. St. 79.

Laval v. Rowley, 17 Ind. 36.

§ 9. *Master of a Ship:*

By the law of shipping, the master of a ship, if his vessel be in distress, or wrecked, in some place away from home, where, however, there is still opportunity to sell the ship or its cargo, may sell either the whole of the property, if necessary, or such portion of it as the situation may absolutely require. The doctrine, however, is only a special kind of agency, in which the master, in the emergency, has authority to act for the owners. It is now becoming less frequent in its application, owing to the increased possibilities of communication, by telegraph and cable, with all parts of the commercial world, whereby the master may obtain definite instructions from the home port.

The Amelie, 6 Wall. 26.

Meyers v. Baymore, 10 Pa. St. 114.

§ 10. *Factors, Commission Merchants:*

Factors, or commission merchants, differ from other agents to sell, as, for example, brokers, in that a factor is intrusted with the goods to be sold and sells them in the capacity of a bailee. This doctrine is, however, merely a branch of the law of agency. The principles relating to sales by ordinary factors apply, equally, to factors

who sell under a *del credere*¹ commission, which is simply a further stipulation whereby the factor, in return for an additional commission, guarantees to his principal the payment when goods are sold on credit.

Bradley v. Richardson, 23 Vt. 720.

§ 11. *Factors Acts:*

Acts known as "Factors Acts" (see Appendix) exist in a number of states, for example, in New York, Maryland, Maine, Massachusetts, Ohio, Pennsylvania, Rhode Island and, possibly, in other states. Their object is to increase the authority of factors beyond that conferred upon them by common law, by permitting them, for example, to pledge, under certain circumstances, the goods intrusted to them. Such laws also aim to give greater protection to the title acquired by *bona fide* purchasers from factors, by making the possession of the goods or bill of lading by actual factors conclusive evidence of the authority of such factors to sell.

Warner v. Martin, 11 How. (U. S.) 209.

Price v. Wisconsin Marine Ins. Co., 43 Wis. 267.

Dorrance v. Dean, 106 N. Y. 203.

§ 12. *Factors, continued:*

Sales by factors are subject to certain rules of the law of agency which cannot be dwelt upon here. Factors, however, must act within their authority to protect even innocent purchasers. Moreover, the goods intrusted to factors cannot be executed upon to satisfy judgments in favor of creditors of such factors, and if the goods are so sold the purchaser gets no title against the principal.

Romeo v. Martucci (Conn., 1900), 47 L. R. A. 601.

Barnes Safe & Lock Co. v. Bloch Bros. (W. Va.), 22 L. R. A. 850. (See note to this case.)

Schloss v. Feltus, 103 Mich. 525, 36 L. R. A. 161 (and note).

¹ *Del credere* (Italian), "of belief, or trust."

§ 13. *Auctioneers and Other Agents:*

Any duly authorized agent may, of course, sell for the owner, such sales, in contemplation of law, being made by the owner through his representative. There are, however, some important questions connected with sales by agents, such, for example, as warranting the goods, giving credit, etc. As to these matters, and also as to general rules governing auctioneers, see

Mechem on Agency, §§ 335 *et seq.*, 890 *et seq.*

b. *The Buyer or Vendee.*

§ 14. In answer to the question, Who may buy? we may briefly reply that any person who is competent to enter into a contract may make a valid purchase. Certain principles, however, relating to married women, infants, and persons *non compotes mentis*, should be noted.

§ 15. *Married Women:*

At common law their contracts are, in general, absolutely void.

Schouler's Domestic Relations, § 58.

Swing v. Woodruff, 41 N. J. L. 469.

Blk. Com., I, 442.

Musick v. Dodson, 76 Mo. 624.

But, at common law, a married woman may, as implied agent, bind the husband for necessaries.

Schouler's Domestic Relations, § 60 *et seq.*

Parke v. Kleeber, 37 Pa. St. 251.

Courts of equity, however, modify, in some cases, the strictness of the common-law rule.

Jaques v. M. E. Church, 17 Johns. 548.

Ankeny v. Hannon, 147 U. S. 118.

Yale v. Dederer, 18 N. Y. 265; s. c., 22 N. Y. 450.

Todd v. Lee, 15 Wis. 365.

Major v. Symmes, 19 Ind. 117.

Statutory enactments, however, during the past fifty years have wrought radical changes in the *status* of married women. Mr. Schouler speaks of the difference as a "social revolution." Some of the states confer upon married women full contractual powers, removing all of the common-law disabilities of *coverture*. Other states have not as yet gone so far. The several statutes must be consulted.

See Schouler's Domestic Relations, § 113 *et seq.*

Plomer v. Lord, 7 Allen, 481.

Homan v. Headley, 58 N. J. L. 485.

§ 16. *Infants:*

The contracts, in general, of an infant are *voidable*, not *void*. He may buy and sell, and, as a purchaser, may acquire a good title. He cannot, however, be made to pay for his purchases not necessaries, and he may repudiate any sale or any purchase of non-necessaries. For his purchases of necessities, however, he is liable.

Earle v. Reed, 10 Met. 387.

Gregory v. Lee, 64 Conn. 407.

Sims v. Everhardt, 102 U. S. 300.

§ 17. *What are Necessaries?*

Unless the case is a clear one, the question is one for the jury.

Bent v. Manning, 10 Vt. 225.

McKanna v. Merry, 61 Ill. 177.

Middlebury College v. Chandler, 16 Vt. 686.

Barnes v. Barnes, 50 Conn. 572.

Chapin v. Shafer, 49 N. Y. 407.

§ 18. *Statutory Changes:*

At the common law, infants reach their majority at the age of twenty-one years. Some of the states have, by statute, changed this rule in regard to females, making eighteen years the age of their majority. Other statutes make infants liable for their purchases when

made through misrepresentation as to their age, also liable for their purchases if engaged in trade. The statutes of the particular state must be consulted.

§ 19. *Persons Mentally Incompetent:*

The purchases and sales of persons *non compotes mentis* are, in general, voidable. This class of persons includes idiots, lunatics, drunkards, and others of weak mind, regardless of the peculiar form of the mental incompetency. The law, in its protection of the weak, throws around such persons certain safeguards. They are liable, however, for necessaries, and, of course, for all purchases made in lucid intervals, if the insanity be of an intermittent character. Some courts, moreover, hold such persons liable for things not necessary, if sold to them in good faith, without reasonable cause for suspecting insanity, and providing the goods cannot be recovered.

Allen v. Berryhill, 27 Iowa, 540.

Van Horn v. Hann, 39 N. J. L. 207.

Beals v. See, 10 Pa. St. 56.

McCormick v. Littler, 85 Ill. 62.

Alexander v. Haskins, 68 Iowa, 73.

Carpenter v. Rogers, 61 Mich. 384.

2. MUTUAL ASSENT.

§ 20. Since no contract can be formed without the mutual agreement of the parties concerned, it is often very important, in cases of doubt or dispute, to determine whether or not the requirement of mutual assent has been complied with.

§ 21. *The Assent May be Expressed or Implied:*

W. U. Tel. Co. v. Chicago R. R. Co., 86 Ill. 246, 29 Am. R. 28.

Street v. Chapman, 29 Ind. 142.

Rickey v. Stewart, 45 Minn. 437.

§ 22. *The Assent Must be Mutual and Without Conditions:*

By this is meant that there must be an *actual offer* and an *acceptance* of the offer *as made*. To impose conditions upon an acceptance is not an acceptance of the proposal as made, but is a new offer, which, in turn, requires an acceptance from the other party.

Potts v. Whitehead, 23 N. J. Eq. 514.

Litz v. Goosling et al. (Ky.), 21 L. R. A. 127; and see note to this report.

Lincoln v. Erie Preserving Co., 132 Mass. 129.

Eggleston v. Wagner, 46 Mich. 610.

Plant Seed Co. v. Hall, 14 Kan. 553.

§ 23. *The Assent Must be Communicated:*

White v. Corlies, 46 N. Y. 467.

McDonald v. Boeing, 43 Mich. 394, 38 Am. R. 199.

Trounstine v. Sellers, 25 Kan. 447.

§ 24. *An Offer May be Retracted Before Acceptance:*

The famous case of *Cooke v. Oxley* (3 T. R. 653) is the leading one upon this question. The defendant promised to sell to the plaintiff two hundred and sixty-six hogsheads of tobacco at a certain sum, and agreed to leave the offer open till four o'clock in the afternoon. Within the time stipulated plaintiff agreed to purchase, but defendant had withdrawn his offer in the interval. *Held*, no contract, the promise being without consideration. For criticisms upon this case, see Kent, Com., II. (12th ed.), p. 478; also Hallock v. Insurance Co., 26 N. J. L. 268. See also Benjamin on Sales (7th ed.), p. 69. The rule now accepted, generally, both in England and America, is that an offer may certainly be retracted before acceptance, but that such retraction must be duly communicated to the one to whom the offer was made.

Boston R. R. Co. v. Bartlett, 3 Cush. 224.

Larmon v. Jordan, 56 Ill. 204.

Weiden v. Woodruff, 38 Mich. 180.

Quick v. Wheeler, 78 N. Y. 300.

Hawkinson v. Harmon, 69 Wis. 551.

§ 25. *Acceptance by Letter or Telegram:*

Frequently offers of sales are made through the medium of letters or telegrams, and then the question arises, May the same means be used to communicate the acceptance, and, if so, when is the sale complete? The general rule is that offers made by letters or telegrams may be accepted, within a reasonable time, and *before knowledge of retraction by the offerer*, by the same means by which the offer was made.

Mactier v. Frith, 6 Wend. 103.

Vassar v. Camp, 11 N. Y. 441.

Hamilton v. Insurance Co., 5 Pa. St. 339.

Moore v. Pierson, 6 Iowa, 279.

§ 26. *Date of Acceptance:*

It is generally held in such cases that the sale dates from the time the letter is posted or the message is left at the telegraph station to be forwarded, irrespective of the fact whether or not the addressee ever receives the letter or the telegram. The one mailing the acceptance has employed the means or agency authorized by the offerer. He has by mailing his acceptance, properly addressed, done all that could reasonably be required, and therefore the contract is closed.

Mactier v. Frith, 6 Wend. 103.

Tayloe v. Insurance Co., 9 How. 390.

Hallock v. Insurance Co., 26 N. J. L. 282.

Howard v. Daly, 61 N. Y. 362.

Trevor v. Wood, 36 N. Y. 307.

§ 27. *Sale by Operation of Law:*

There are cases in which a sale is said to take place without the mutual assent of the parties, but by the operation of law. Thus, where one sues for the conversion of

goods (trover), and recovers the value thereof, the title is said to vest in the defendant by the right of sale.

Curtis v. Groat, 6 Johns. 168, 5 Am. Dec. 204.

Wooley v. Carter, 7 N. J. L. 85.

Kenyon v. Woodruff, 33 Mich. 315.

Lovejoy v. Murray, 3 Wall, 1.

Query. Would there be a *sale* in such a case, "by operation of law," in a state where it is illegal to sell intoxicating liquors? Suppose B converts to his own use A's wine. A may lawfully possess the wine, but cannot sell it within the state. B by unlawful act possesses himself of A's wine. A now sues for the conversion. What becomes of the *title* to the wine?

§ 28. *Assent as Affected by Mistake:*

The parties assenting to a sale may either mutually or individually be under a misapprehension as to certain matters connected with it, such, for example, as the identity of the chattel, its species, its price, or there may be some mistake as to the identity of the person dealt with. In what way do these circumstances affect the assent? The principles connected with these questions are treated in Part III, under the title of MISTAKE, to which the reader is referred.

3. THE THING SOLD.

§ 29. *No Longer in Existence:*

If the chattel which is the subject-matter of the sale is no longer in existence at the time of the formation of the contract, there is, of course, no consideration, and therefore no enforceable contract.

Kelly v. Bliss, 54 Wis. 187. (Property destroyed by fire.)

Gibson v. Pelkie, 37 Mich. 380.

Gardner v. Lane, 9 Allen, 499, 85 Am. Dec. 779.

Dexter v. Norton, 47 N. Y. 62.

§ 30. Not yet Having Come into Existence: (*Invalid.*)

Cameron v. Marvin, 26 Kan. 612.

Head v. Goodwin, 37 Me. 181.

Williams v. Briggs, 11 R. I. 476, 23 Am. R. 518.

Gittings v. Nelson, 86 Ill. 591. But see also, below, under "Potential Existence" (§ 31), and "Equitable Sales" (§ 34).

§ 31. Potential Existence:

Hull v. Hull, 48 Conn. 250.

Arques v. Wasson, 51 Cal. 620, 21 Am. R. 718.

Headrick v. Brattain, 63 Ind. 438.

Andrew v. Newcomb, 32 N. Y. 417.

§ 32. Rule as to Crops:**(a) Planted: (*Valid.*)**

Sanborn v. Benedict, 78 Ill. 309.

Wilkinson v. Ketler, 69 Ala. 435.

(b) Unplanted:

Van Hoozer v. Cory, 34 Barb. 9. (*Held, valid.*)

Brainard v. Burton, 5 Vt. 97. (*Held, invalid.*)

Butt v. Ellett, 19 Wall. 544. (*Held, invalid.*)

Headrick v. Brattain, 63 Ind. 438. (*Held, valid.*)

Gittings v. Nelson, 86 Ill. 591. (*Held, invalid.*)

Long v. Hines, 40 Kan. 220. (*Held, invalid.*)

Dickey v. Waldo, 97 Mich. 255. (*Held, valid.*) s. c., 23 L. R. A. 449, and note.

§ 33. Mere Possibility or Hope: (*Invalid.*)

Low v. Pew, 108 Mass. 347.

Needles v. Needles, 7 Ohio St. 432.

Sherwood v. Walker, 66 Mich. 568.

§ 34. Equitable Sales:

Equity will, at times, construe a contract so as to give to the vendee a lien upon the property when the same, not in existence at the time of the contract, afterwards comes into the ownership of the vendor. The doctrine is most frequently applied, however, in case of mortgages.

Kribbs v. Alford, 120 N. Y. 519.

Gregg v. Sanford, 24 Ill. 17.

Beall v. White, 94 U. S. 382.

§ 35. *Intangible Property:*

Things not in *physical* existence may, nevertheless, be subjects of sale; such as the good-will of a business, a seat in a stock exchange, a trade-mark, a copyright, a patent, etc.

Barber v. Conn. Mut. Ins. Co., 15 Fed. R. 312.

Hathaway v. Bennett, 10 N. Y. 108.

Reed v. Golden, 28 Kan. 632. (Information of the location of an oil well.)

Burton v. Stratton, 12 Fed. R. 696.

§ 36. *Goods Not in Owner's Possession:*

They may, however, be sold, as, *e. g.*, to a bailee, or other person.

Webber v. Davis, 44 Me. 147.

First Ward Nat. Bank v. Thomas, 125 Mass. 278. But see McLary v. Turner (Del.), 32 Atl. R. 325, where it is said that one cannot sell goods not in his possession without delivery thereof.

Lake v. Morris, 30 Conn. 201.

4. THE PRICE.

§ 37. *Must be Money or Money's Worth:*

Goldsmith v. Greenly (Del.), 32 Atl. R. 250. But see Cunningham v. Ashbrook, 20 Mo. 556, where it is said "in money or other property."

Williamson v. Berry, 8 How. 544.

Eldridge v. Kuehl, 27 Iowa, 178.

§ 38. *Can be Either Paid or Promised:*

McEwen v. Morey, 60 Ill. 32.

Bonnell v. Chamberlin, 26 Conn. 492.

Hayden v. Dwyer, 47 Minn. 246.

§ 39. *No Credit, However, Without Agreement:*

Phelps v. Hubbard, 51 Vt. 589.

Haskins v. Warren, 115 Mass. 533.

Ward v. Shaw, 7 Wend. 404.

Michigan C. R. Co. v. Phillips, 60 Ill. 190.

§ 40. May be Fixed by Parties, or Submitted to Referee:

Norton v. Gale, 95 Ill. 533.

McConnell v. Hughes, 29 Wis. 537. (Left to the market price.)

Brown v. Bellows, 4 Pick. 179.

Humaston v. Telegraph Co., 20 Wall. 20.

§ 41. Referee Failing to Act:

Should the referee fail to act, then, in absence of fraud on the referee's part, there is no contract.

Fuller v. Bean, 34 N. H. 290.

Scott v. Whitney, 41 Wis. 504.

Smyth v. Craig, 3 W. & S. 14.

§ 42. Price, at Times, May be Implied:

In certain cases a reasonable price may be implied. This is true when the parties have entered into the contract without having specified the price, a common transaction in ordering goods for daily use.

Taft v. Travis, 136 Mass. 95.

James v. Muir, 33 Mich. 224.

§ 43. Rules for Determining a Reasonable Price:

Generally, the price is the market value of the goods at the time of the sale. In case of dispute, it is, of course, for the jury.

Hill v. Hill, 1 N. J. L. 261.

Fenton v. Braden, 2 Cranch, 550.

Kountz v. Kirkpatrick, 72 Pa. St. 373.

Lovejoy v. Michels, 88 Mich. 15.

5. PLACE OF THE SALE.

§ 44. The place of a sale, as the place of contract in general, is where the parties complete the mutual assent. It is where the offer of one party is accepted by the other. In case of a verbal contract this would be, of course, where the parties are. In case an offer is made by letter, the contract is closed when and where the acceptance is

mailed. The place of the *formation* of the contract is not, necessarily, however, the place of the *performance* of it, and the general rule is that the law of the place where the parties intended the contract to be *performed* will apply. In absence of other agreement, the place where the goods are is the place of delivery, although, between the parties, no delivery is *necessary* to the sale, or to the passing of the title.

Com. v. Hess, 148 Pa. St. 98, 17 L. R. A. 176. And see note appended to this case in L. R. A.

In the above case it was held that a wholesale liquor dealer's *place of business* was the place of sale, although the goods were sent into another county; and, in general, the place of sale is the place of the shipment, or the place of the consummation of the contract.

Tegler v. Shipman, 33 Iowa, 194.

Boothby v. Plaisted, 51 N. H. 436, 12 Am. R. 140.

Higgins v. Murray, 73 N. Y. 252.

McCarty v. Gordon, 16 Kan. 35.

Sarbecker v. State, 65 Wis. 171.

§ 45. *Place of Recording Conditional Sales:*

The statutes of many states require, for the protection of creditors and subsequent purchasers, that conditional sales (see § 87 (4)) must be recorded in order to make them valid against such third persons. The rule in such cases is that the *lex loci* where the goods are located applies.

Wooley v. Geneva Wagon Co. (N. J., 1896), 25 Atl. R. 789.

Baldwin v. Hill, 4 Kan. App. 168.

Dixon v. Blondin, 58 Vt. 689.

Wallen v. Crossman, 45 Mich. 333.

§ 46. *Orders Taken by Traveling Agents:*

In recent years much of the wholesale business of the country has been carried on through the agency of

commercial travelers or "drummers." It should be remembered that, as a rule, such agents' authority extends only to the soliciting of orders. They have, generally, no power to receive payment, although, on the other hand, they have, it seems, implied power to warrant the quality of the goods ordered. The place of sale is at the place of business of the principal when the latter accepts the order. These general rules may, however, be modified by circumstances.

Chambers v. Short, 79 Mo. 204.

Bailey v. Pardridge, 184 Ill. 188.

Talmadge v. Bierhause, 103 Ind. 270.

Kane v. Barstow, 42 Kan. 465.

Williams v. Feiniman, 14 Kan. 288.

Gill v. Kaufman, 16 Kan. 571.

Clough v. Whitcomb, 105 Mass. 482.

§ 47. Place as Affected by Agency of Common Carrier:

In general, delivery to a common carrier is delivery to the buyer, and thus passes the title at the place where the shipment is made.

State v. Carl, 43 Ark. 354, 51 Am. R. 565.

Hill v. Spear, 50 N. H. 253, 9 Am. R. 205.

Shuenfieldt v. Junkerman, 20 Fed. R. 357.

§ 48. C. O. D. Cases:

The rule as to place of delivery in goods sent C. O. D. is discussed in a subsequent section. (See Part II, division 5, c, § 99.)

B. BY THE STATUTE OF FRAUDS.

§ 49. Thus far we have considered the essential elements in the formation of a contract of sale at the common law. We are now to observe in what way the formation of the contract is affected by statutes which require certain contracts to be in writing. Our American statutes upon the subject are patterned after the

famous English statute, commonly cited as the Statute of Frauds.

The English statute, "An Act for the Prevention of Frauds and Perjuries" (29 Car. II, c. 3), was passed in 1676, and went into effect the following year. The act was very broad in its scope, and covered a much wider area than contracts pertaining to sales, which, however, at this time, are alone pertinent to our consideration. The object of the statute was to prevent frauds and perjuries by requiring that certain kinds of contracts should be evidenced by *writing* and by the *signatures* of the parties to be charged thereby, and, therefore, making inadmissible, in such cases, parol testimony which depends upon the mere memory of the witness, and which, from its nature, affords greater facility in the perpetration of frauds through perjury.

The two sections of the statute relating to sales are the fourth and the seventeenth, the former governing sales connected with real property, the latter pertaining to the sale of "goods, wares, or merchandises." The words of the seventeenth section are as follows: "And be it enacted, that from and after the said four-and-twentieth day of June (A. D. 1677), no contract for the sale of any goods, wares, or merchandises, for the price of ten pounds sterling, or upwards, *shall be allowed to be good*, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum *in writing* of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." This famous act, although intended to curtail litigation, has been prolific of more legal disputes than its framers ever dreamed. Through a long series of decisions, however, the interpretation of the seventeenth section has become

practically established, and a similar statute has been enacted in nearly all of the American states.¹ It remained, in its original form, on the statute books of England for over two hundred years, being repealed, there, only in the year 1893. The present English statute (56 and 57 Vict., c. 71), enacted in that year, substitutes the following language for the seventeenth clause of the old Statute of Frauds:

“A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.”

We will now review the important questions arising out of such statutes, which exist, as has been stated, in nearly all our states.

1. WHAT IS A CONTRACT FOR A SALE?

§ 50. As we have seen in the discussion of the definition of a sale (§ 1), there is a difference between a contract of sale, or “*a sale*,” and a contract to sell; the former being an executed contract, the latter an executory one. One of the earliest questions asked under the statute was in connection with this distinction. Does the statute embrace executory as well as executed contracts?

§ 51. Includes Both Executed and Executory Sales:

The early judges differed in opinion as to what contracts came within the statute. The leading English case,²

¹ It does not exist, however, in Rhode Island or in Kansas. (*Bickford v. Champlin*, 3 Kan. App. 681.)

² *Towers v. Osborne*, 1 Strange, 506.

in 1724, decided that executory contracts were not included. Divergent views; however, led to the English act of 1828, known as "Lord Tenterden's Act," which settled the question, for that country, by extending the Statute of Frauds Act to agreements to sell. The recent Sale of Goods Act of England, likewise specifically includes executory contracts.

In the United States the rule is that both present and future sales are included, and our courts had taken this position before the passage of the English act of 1828.

Bennett v. Hull, 10 Johns. 364.

Atwater v. Hough, 29 Conn. 513.

Carman v. Smick, 15 N. J. L. 252.

§ 52. *Sale or Contract for Work and Labor?*

It frequently happens that in contracts relating to goods the contract calls for the manufacture of the specific chattel, or for work and labor, and the question is, in such cases, whether or not the particular contract is within the statute. The early opinion was that if the article did *not exist* ("The Non-Existent Test"), then it was merely an agreement to make a sale when the chattel was completed, and, therefore, not a sale at the time of the contract. Others held that the question should be decided by the *relative value* of the labor to the material used. Another test was that of *the sources* of the material, that is, whether they were to be supplied by the vendor or by the vendee. Finally, in 1861, the English case of *Lee v. Griffin*, 1 B. & S. 272 (an order for two sets of artificial teeth), *held*, that the true test between a sale and a contract for work and labor depends, in each particular case, upon the intention of the parties to pass, or not to pass, the title in a chattel. In other words, does the contract, when carried out, result in the sale of a *chattel?* If so, it is a sale and not a contract for work and labor. This is

now the present English rule, and has been adopted by some of the United States.

Hardell v. McClure, 1 Chand. (Wis.) 271.

Brown v. Sanborn, 21 Minn. 402.

Pratt v. Miller, 109 Mo. 78.

See also in connection with this rule the interesting opinion of Paxson, C. J., in Com. v. Miller, 181 Pa. St. 118.

§ 53. Generally, however, throughout the United States two other rules prevail, and are widely discussed. From the leading cases upon the subject they are referred to as the Massachusetts and the New York rules.

The Massachusetts Rule:

This may be conveniently called the *special order* rule, the chattel not being the property of the vendor at the time. Is the thing specially ordered from the vendor personally, some special skill on his part being required? If so, it is no sale, but a contract for manufacture, or work and labor, and, consequently, not within the Statute of Frauds. But if the article is *usually* kept or made for sale, in the course of his business, by the vendor, and such as would be manufactured for general sale, then it is a sale. If, however, the article usually kept on hand requires some change, addition or alteration, in order to make it conform to the wishes of the one ordering it, then it is a contract for labor. This is the rule that prevails in New England.

Mixer v. Howarth, 21 Pick. 205.

Goddard v. Binney, 115 Mass. 450.

Edwards v. Grand Trunk Ry. Co., 48 Me. 379.

Atwater v. Hough, 29 Conn. 509.

The New York Rule:

The New York rule may be, briefly, called the “Non-Existent Test,” namely, Was the chattel in existence “*in solido*” when the contract was made? If not, then it is a contract for work and labor, and not a sale. If it is in ex-

istence, then it is a sale. Some writers and courts describe this test as the "deliverability test." Contrary to the Massachusetts rule, contracts for additions to, or alterations of, articles already in existence are treated as sales. Some of the later New York cases, however, distinguish between chattels to be made by the vendor personally, and those to be made by other parties upon order of the vendor for the customer, *holding*, in the latter case, that the agreement is a *sale*.

Crookshank v. Burrell, 18 Johns. 58.

Parsons v. Loucks, 48 N. Y. 17.

Cooke v. Millard, 65 N. Y. 352.

Joy v. Schloss, 12 Daly, 533.

Heintz v. Burkhard, 29 Oreg. 55.

Higgins v. Murray, 73 N. Y. 252.

Flynn v. Dougherty (Cal.), 14 L. R. A. 230; and see valuable note to this case.

§ 54. *Agreements to Rescind a Sale:*

An agreement to rescind a sale, if independent of and subsequent to the original sale, is a sale, and therefore within the statute.

Rankins v. Grupe, 36 Hun, 481.

Johnston v. Trask, 116 N. Y. 136. (Here the agreement to rescind was a part of the original contract, and therefore made binding, though oral, by the execution of the original sale.)

2. WHAT ARE "GOODS, WARES AND MERCHANTISES"?

§ 55. Another question of importance, in order to determine whether or not a sale falls within the statute, is whether or not the *subject-matter* of the sale comes within the descriptive words of the statute. Many of our states have retained the phraseology of the old statute, namely, goods, wares, and merchandise. The language is not uniform, however. Some statutes mention merely "goods," and this is the only word of the three now found in the recent English Sale of Goods Act.

Others speak of "chattels;" others of the sale of a "thing;" while still other statutes use the expression "personal property." As to what constitutes "goods, wares, and merchandise," the prevailing language used, we may summarize as follows:

§ 56. *All Corporeal, Movable Articles:*

All the authorities, both English and American, agree that if the article is corporeal and movable it is included in the phrase "goods, wares, and merchandise." This is too clear to require citations.

§ 57. *Incorporeal Articles, Stocks, Bills, Notes, etc.:*

The English decisions do not include such chattels in the statute, but the American courts have given a broader application to the words, and include, within the phrase, shares of stock, notes, negotiable bills, and similar property.

Humble v. Mitchell, 11 Adol. & E. 205.

Tisdale v. Harris, 20 Pick. 9.

North v. Forest, 15 Conn. 400.

Peabody v. Speyers, 56 N. Y. 230.

Contra, *Vawter v. Griffin*, 40 Ind. 600. (The statute of Indiana has the word "goods" only.)

§ 58. *Natural Fruits of the Soil:*

These are the *fructus naturales*, or the perennial crops, the natural products of earth, as distinguished from those crops of periodic planting and artificial production mentioned in the following section. The "natural crops" are the spontaneous crops, although they may be increased by cultivation. Such are most grasses, trees, fruits. The American cases, in general, hold that if such *fructus naturales* are to be severed, within a reasonable time, from the soil, by either party in compliance with the contract, then they are within the meaning of "goods, wares, and merchandise." If, however, they are to remain connected with the soil, they are part of the realty, and,

therefore, not within the seventeenth section of the Statute of Frauds, although they would fall under the fourth section of the same statute—the section pertaining to "interests in lands."

McClintock's Appeal, 71 Pa. St. 365.

Brown v. Stanclift, 80 N. Y. 627.

Owens v. Lewis, 46 Ind. 488.

Whitmarsh v. Walker, 1 Met. 313.

Hirth v. Graham, 50 Ohio St. 57, 19 L. R. A. 721; and see note there reviewing the cases. In the Ohio case standing timber was held to be *realty* whether severance is contemplated or not.

§ 59. *Industrial Fruits of the Soil:*

These are the *fructus industriaes*, or those crops which are sown and produced by labor and industry, frequently called the annual crops. They include the cereals, vegetables, Hungarian grass, flax, and hemp. These are universally held to be personal property, and to be within the statute.

Bull v. Griswold, 19 Ill. 631.

Bricker v. Hughes, 4 Ind. 146.

Polley v. Johnson, 52 Kan. 478.

3. OTHER TERMS IN THE STATUTE.

§ 60. In the great amount of litigation arising from the Statute of Frauds, certain other definite conclusions have been reached as to the further technical terms employed. We note them briefly, as follows:

§ 61. *The Price:*

If several articles are sold, if they are really component parts of one sale, then their aggregate price is to determine whether or not the contract falls within the statute. The question is not as to one article, but whether the various articles comprise *one* sale or *different* sales.

Allard v. Greasert, 61 N. Y. 1.

Gault v. Brown, 48 N. H. 183.

Mills v. Hunt, 17 Wend. 333.

§ 62. *Acceptance:*

Care must be taken to distinguish “acceptance” from “receipt.” The former is a *mental* act, the assent of the buyer that the goods are those he agreed to take by the contract. Acceptance may *precede*, be *contemporaneous* with, or may *follow* the contract.

Caulkins v. Hellman, 47 N. Y. 449.

Meehan v. Sharp, 151 Mass. 564, 24 N. E. R. 907.

§ 63. *Receipt:*

To “accept” and “receive” a *part* is all that the statute requires. To receive the goods is to take them by the assent of the vendor, thus implying a *delivery* on the vendor’s part. The vendor, however, as agent for the vendee, may receive the goods as bailee. A receipt of a *sample* is not, however, a receipt of *part* of the goods, and the reception of a part must be with an intention to receive the whole.

Stone v. Browning, 51 N. Y. 211.

Hinchman v. Lincoln, 124 U. S. 38, 8 Sup. Ct. 369.

Atherton v. Newhall, 123 Mass. 141.

Janvrin v. Maxwell, 23 Wis. 51.

§ 64. *Earnest:*

Earnest is something of value, not, however, a part of the price. It is merely the survival of an old custom to show, by such evidence, that the parties are *in earnest*, by thus giving formal assent to the contract. The word and custom are of no practical value in this country, although the word is retained in many of our statutes upon the subject.

Noakes v. Morey, 30 Ind. 103.

Krohn v. Bantz, 68 Ind. 277.

§ 65. *Part Payment:*

Anything of actual value, if really given as part payment, is sufficient. A mere promise to pay is not sufficient,

however. Unless the particular statute says that the part payment shall be made at the time of the sale, it is sufficient if it be made and *accepted* any time before the bringing of the action.

Weir v. Hudnut, 115 Ind. 525, 18 N. E. R. 24.

Paine v. Fulton, 34 Wis. 83.

Hunter v. Wetsell, 84 N. Y. 549.

4. THE MEMORANDUM.

§ 66. "Some note or memorandum in writing," says the statute. It is important to observe that it is a mere "note," not a formal bill of sale. It is in the nature of an *admission*, and if it can be proven to have been *made*, that is sufficient, since delivery of it is not necessary. Even a letter to a third party, refusing to abide by the contract, is sufficient if it contains the necessary elements of the memorandum.

§ 67. *What Must it Contain?*

Out of a long line of discussions it is settled that the note or memorandum, in order to satisfy the requirements of the statute, must contain the following essentials:

- (1) The parties, both buyer and seller.

Generally, of course, the names of the parties are given, but any description sufficient to identify either party, as, for example, an official designation, is all that is required. Even initials are admissible, parol evidence being competent to identify them.

Grafton v. Cummings, 99 U. S. 100.

- (2) The price, if agreed upon.

James v. Muir, 33 Mich. 223.

Norton v. Gale, 95 Ill. 533.

Ide v. Stanton, 15 Vt. 685.

See, however, O'Neil v. Crain, 67 Mo. 250.

(3) Description of the goods.

Eggleson v. Wagner, 46 Mich. 610.
Tallman v. Franklin, 14 N. Y. 584.
Pulse v. Miller, 81 Ind. 190.

(4) Any other *specific* part of the contract.

Callanan v. Chapin, 158 Mass. 113, 32 N. E. R. 941.
Peltier v. Collins, 3 Wend. 459.
Lester v. Heidt (Ga.), 12 S. E. R. 214.

(5) Signature of party to be charged.

Coe v. Tough, 116 N. Y. 273.
Crystal Palace Flouring-Mills Co. v. Butterfield (Colo., 1900),
61 Pac. R. 479.
Hodges v. Kowing, 58 Conn. 12.

§ 68. *Need the Memo. Contain the Consideration?*

This is a disputed question, and the decisions are not in harmony. The prevailing rule, in absence of statute, is that the consideration need not be stated. The cases, it should be noted, often distinguish between the section of the statute (seventeenth) referring to sales of personalty, and the fourth section, referring to sales of realty.

Maine v. Warlters, 5 East, 10, 2 Sm. L. C. 251 (8th ed.).
Williams v. Robinson, 73 Me. 186.
Smith v. Ide, 3 Vt. 290.
Moses v. Lawrence Co. Bank, 149 U. S. 298.
Sage v. Wilcox, 6 Conn. 81.

§ 69. *On Different Papers, When?*

It is not necessary that the "note or memorandum" should be on a single paper, since the contract may be gathered from letters and telegrams in correspondence. If, however, the essential elements of the memorandum are on different or unconnected papers, and not all are signed, then the *signed* one must sufficiently refer to the unsigned paper or papers in order to incorporate it or them within the signed paper. Any artificial means of connection, however, is sufficient for one signature, such connections, for example, as pins, tape, mucilage, etc., and should the

papers become separated before being produced in evidence, parol testimony is admissible to show that they were previously attached when the memorandum was made.

Coe v. Tough, 116 N. Y. 273.

Crystal Palace Flouring-Mills Co. v. Butterfield, 61 Pac. R. 479.

Thayer v. Luce, 22 Ohio St. 62.

Bayne v. Wiggins, 139 U. S. 210, 11 Sup. Ct. 521.

§ 70. *As to Initials:*

In connection with the signature, mere initials are sufficient, or even a person's mark, and, unless the statute requires the memorandum to be "subscribed," the name of the party to be charged may be placed anywhere upon the memorandum of the sale.

Merchants' Bank v. Spicer, 6 Wend. 443.

Salmon Falls Mfg. Co. v. Goddard, 14 How. 446.

New England Co. v. Standard Worsted Co., 165 Mass. 331.

Davis v. Shields, 26 Wend. 341.

§ 71. *Signatures by Agents:*

The statute provides that an agent lawfully authorized may sign the memorandum, thereby binding his principal whether disclosed or not. It is not necessary that the agent in signing the memorandum should disclose his principal. The many important questions connected with the rights, liabilities, authority and powers of agents in such cases belong to the subject of agency, and cannot be further considered here. In connection, however, with the question before us the following cases are illustrative:

Bent v. Cobb, 9 Gray, 397, 69 Am. Dec. 295. (Auctioneers are agents of *purchasers* for purpose of signing memorandum of sale.)

Thomas v. Kerr, 3 Bush, 619, 96 Am. Dec. 262.

Austrian & Co. v. Springer, 94 Mich. 343, 54 N. W. R. 50.

Signatures by brokers may be properly considered here. A broker is merely a special agent, and, as such, has authority to sign only as specifically authorized. The bro-

ker's book entry constitutes the contract, but without such entry the stub notes, known as his "bought and sold notes," are the memorandum, and in case of their variance, no formal entry existing, there is no valid memorandum of the sale. This question, however, is more important in England than in this country, and it seldom arises in our methods of business.

Coddington v. Goddard, 16 Gray, 436.

Canterbury v. Miller, 75 Ill. 355.

§ 72. *Parol Testimony and the Memorandum:*

Questions concerning the admissibility of parol testimony in connection with memoranda of sales sometimes arise. Although the consideration of such matters belongs to the special subject of evidence, yet one branch of the law so overlaps another that it is important to note one or two points here. The memorandum is not a *formal* written contract; therefore the rule that parol evidence cannot be introduced to vary, alter or modify a written contract does not apply here. Parol evidence is admissible to show that the memorandum is not complete, that is, that it does not contain the actual terms of the agreement of the parties. On the other hand, the rule, at *common law*, that a written contract may be changed by a *subsequent oral* contract does not apply to this *statutory* requirement. If there be a subsequent contract it, also, must be a memorandum in *writing* in order to satisfy the statute. Parol evidence may be used to explain initials, to identify persons who are described, but not named, in the memorandum, and, some say, to prove mutual abandonment of the original contract. This last, however, is doubtful doctrine.

Peltier v. Collins, 3 Wend. 459.

Lee v. Hills, 66 Ind. 474.

Grafton v. Cummings, 99 U. S. 111.

Hill v. Blake, 97 N. Y. 216. (See, however, Negley v. Jeffers, 28 Ohio St. 90.)

Buel v. Miller, 4 N. H. 196.

5. THE EFFECT OF THE STATUTE.

§ 73. If we examine the language of the Statute of Frauds we shall observe that the seventeenth section says that unless the provisions of that section are complied with “no contract . . . shall be allowed to be good.” The new English Sale of Goods Act (1893) says, “shall not be enforceable by action.” The fourth section of the old statute (the section relating to sales of lands, etc.) says, “no action shall be brought” without compliance with the statute, and the wording of our American statutes varies in about the same way. What, then, is the effect of these statutes? There have been several answers to this question. Some have said that a failure to comply with the statute makes the contract a nullity; others, that the effect is to enable either party to rescind; while others say that the statute affects only the *remedy* in case of breach. In other words, if one is to enforce certain contracts a certain kind of evidence is necessary, and this last view is, undoubtedly, the prevailing and generally accepted one. Of course, if a statute says that a failure to comply with the requirements shall make the contract *void*, the question, locally, may be regarded as practically settled.

Shaw v. Shaw, 6 Vt. 69.

Minns v. Morse, 15 Ohio, 568.

Jefferson v. Dallas, 20 Ohio St. 68.

Parsons on Contracts, III, p. 63 (7th ed.).

Browne on Statute of Frauds, ch. 8.

6. OTHER STATUTES.

§ 74. Unless some statute requires it, no contract need be in writing; but in order to provide for the validity of contracts of sale (as of other contracts), statutory requirements, if any, are to be carefully followed. We shall see

later that certain "conditional sales" must be recorded, and therefore, for that purpose, reduced to writing. It is a rule in admiralty that a written bill of sale must be given in case of the sale of a vessel, although it is said that this rule has not the force of law.¹ The United States Revised Statutes (§§ 4170, 4192) require that when a registered vessel is sold to a citizen of the United States there must be some writing in the nature of a bill of sale reciting the certificate of registry, otherwise the vessel cannot be re-registered. A seal, however, is not necessary to a bill of sale.

Hozey v. Buchanan, 16 Pet. 215.

Gibson v. Warden, 14 Wall. 247.

¹Parsons on Contracts, II, 385 (7th ed.).

PART II.

EFFECTS OF THE CONTRACT.

§ 75. Having, thus far, discussed the formation of the contract, first, at common law, and secondly, under the requirements of the Statute of Frauds, we come now to a series of very important and somewhat technical questions, or those which are concerned with the effect of the contract upon the title of the goods which are the subject-matter of the sale. As we have already observed, contracts may be either executed or executory. Again, there may be conditions connected with a sale or there may be no conditions whatever. Moreover, the goods forming the subject-matter of the contract may be specific or definitely ascertained goods, or they may be unspecified, being, for example, a part of a larger quantity or mass. These questions will be referred to, therefore, in order.

1. EXECUTED AND EXECUTORY SALES.

§ 76. Since an executory sale is not a completed contract, and therefore passes no title, it is often very important to determine whether the contract under consideration is an executed one, or only executory in character. If the contract be executed, then the title passes, and with it, likewise, the risk and the loss, if any.

§ 77. *The Loss Follows the Title:*

This is the universal rule, and is always followed unless by express agreement of the parties the risk is cast

upon the one who is not the owner. The rule has been questioned, however, in certain cases, and it has been held that a loss occasioned by a negligently delayed delivery is upon the party responsible for the fault, and the English Sale of Goods Act thus specifically provides. It is not clear, however, upon principle, how an act of negligence can affect the title *if* it has once passed. No doubt the damaged party has his remedy, but it is not by holding that the title is in the party causing the fault.

Lansing v. Turner, 2 Johns. 13.

Whitcomb v. Whitney, 24 Mich. 486.

Joyce v. Adams, 8 N. Y. 291.

Terry v. Wheeler, 25 N. Y. 520.

Cushman v. Holyoke, 34 Me. 289.

Elgee Cotton Cases, 22 Wall. 180. (Agreement.)

Tufts v. Griffin, 107 N. C. 47, 12 S. E. R. 68. (An absolute promise to pay.)

Sale of Goods Act, § 20.

§ 78. *Whether Executed or Executory?*

In general, whether the contract is executory or executed is to be determined by *the intention of the parties*, and in ascertaining this intention all the circumstances, including the language used, and the condition of the goods, are to be taken into consideration.

Terry v. Wheeler, 25 N. Y. 520.

Howell v. Pugh, 27 Kan. 702.

Hatch v. Oil Co., 100 U. S. 135.

Graff v. Fitch, 58 Ill. 373.

Morrow v. Reed et al., 30 Wis. 81.

Phillips v. Moor, 71 Me. 78.

§ 79. *The Legal Presumption:*

Where the goods are specified and ready for delivery, in absence of evidence showing intention either way, the legal presumption is that the sale is a completed or executed one. The goods, however, being unspecified, or something remaining to be done by either party prior to

their delivery, are facts which, in absence of other evidence, establish an executory sale.

Chapman v. Shepard, 39 Conn. 413.

Kohl v. Lindley, 39 Ill. 195.

Stephens v. Santee, 49 N. Y. 35.

2. SPECIFIED GOODS, NO CONDITIONS.

§ 80. It is very clear that if the evidence shows that the goods are properly specified and designated, and that no conditions whatsoever are attached to the sale, the contract is executed, and the title and risk pass at once. In such cases it is not necessary, as to title, so far as the parties themselves are concerned, that there should be either delivery or payment.

Dixon v. Yates, 5 B. & Ad. 313.

Wing v. Clark, 24 Me. 366.

Phillips v. Moor, 71 Me. 78.

McCandlish v. Newman, 22 Pa. St. 460.

Webster v. Anderson, 42 Mich. 554.

Rail v. Little Falls Lumber Co., 47 Minn. 422; *Kent, Com., II*, 492.

Shepard v. Lynch, 26 Kan. 377.

3. "CONDITIONAL SALES."

GOODS SPECIFIC, BUT CONDITION TO BE PERFORMED.

§ 81. Where the goods are ascertained, or specific, yet either the vendor or the vendee is, by the contract, to do something, either precedent or concurrent, in the performance of the contract, the sale is called a "conditional sale," is executory, and, in general, no title passes.

The subject of "conditional sales" is one of the most important topics in the whole law of sales. Although such "sales," being, in their nature, executory, are not sales at all, yet the legal principles relating to such contracts are inseparably connected with the law of sales,

and require very careful consideration. The term "conditional sale" is an expressive and a convenient one, and is fixed in legal phraseology. Whether or not there *is* a condition is a question of evidence, and the condition may be express, or it may be implied from the conduct of the parties, or from the circumstances of the case.¹ In addition to what is said here upon the subject of conditional sales, further discussion will be given to it in a subsequent section, under "Performance of the Contract," in Part IV.

§ 82. As means for determining, in case of dispute as to title, whether or not the sale was a conditional one, and, therefore, passing no title, the following rules have been widely quoted and followed by the courts. The first two are from Blackburn (On Sales, 151-153), and the third is from Benjamin (p. 270, 7th ed.).

1. Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, *into a deliverable state*, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.

2. Where for the purpose of ascertaining the price, which is to depend upon the quantity or quality of the goods, it is necessary to weigh, measure, or test the goods, the performance of these things shall also be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted.

3. Although the goods have been actually delivered to the buyer, yet if by the contract he is bound to do anything as a condition, either precedent or concurrent, upon which the passing of the property depends, the property will not pass until the condition is performed.

¹ McManus v. Walters (Kan., 1900), 61 Pac. R. 686.

§ 83. For the purpose of referring to these rules by a convenient short form in each case, we may condense them as follows:

1st. Goods must, if so agreed, be in a deliverable state for the vendee in order to pass the title.

Elgee Cotton Cases, 22 Wall. 180. (Cotton to be baled.)

Foster v. Ropes, 111 Mass. 10. (Fish to be dried.)

Groff v. Belche, 62 Mo. 400. (Grain to be threshed.)

2d. If the goods require measuring, weighing, testing, etc., in order to determine the price, this constitutes a condition.

Nesbit v. Burry, 25 Pa. St. 208.

Frost v. Woodruff, 54 Ill. 155.

Kein v. Tupper, 52 N. Y. 550.

McClung v. Kelley, 21 Iowa, 508.

Prescott v. Locke, 51 N. H. 94.

Lingham v. Eggleston, 27 Mich. 324.

3d. If the vendee is yet to do something, precedent or concurrent, as a condition, no title has passed.

Implement Co. v. Parlin, 51 Kan. 544.

Ward v. Shaw, 7 Wend. 404.

Slade v. Lee, 94 Mich. 130.

Fletcher v. Livingston, 153 Mass. 388.

§ 84. *Goods Bought on "Instalment Plan."*

During recent years there has been a great increase in the kind of sales known as sales upon "the instalment plan" of payment. This is frequently illustrated in the sale of furniture, jewelry, etc. Since such sales are, generally speaking, conditional ones, important questions arise concerning them.

The earlier English cases in this line were concerned almost entirely with ship-building contracts, in which it is common to pay by instalments as the work progresses. Like unto contracts for the building of vessels are contracts for the building of houses, or for the sale or manu-

facture of any article, to be paid for as the work proceeds or as the goods are delivered.

(1) Contrary to the English rule laid down in the leading case of *Clarke v. Spence* (4 A. & E. 448), that the property, in such instance, passes *pro rata* as the payments are made, the prevailing rule, in the United States, is that the property does not pass proportionately as the instalments are paid, but only, and then in its entirety, when the instalments are *all* fully paid.

Andrews v. Durant, 11 N. Y. 35.
Elliott v. Edwards, 35 N. J. L. 265.
Derbyshire's Estate, 81 Pa. St. 18.
Clarkson v. Stevens, 106 U. S. 505.
Bacon v. The Poconoket, 67 Fed. R. 262.
Contra, Sandford v. Ferry Co., 27 Ind. 522.

(2) In case of default of an intermediate payment the general rule is that the vendor may retake the goods, and the vendee will lose the previous instalments paid.

Colcord v. McDonald, 128 Mass. 470.
White v. Oakes, 88 Me. 367, 34 Atl. R. 175.
Latham v. Sumner, 89 Ill. 233.
Fleck v. Warner, 25 Kan. 492.

This harsh rule has been changed, however, in some states, for example, Ohio, Missouri, and possibly others, by statutes, which provide that only so much of the previous payments may be retained as will reasonably compensate for the use and wear of the goods. In other states, courts have applied the same principle equitably.

Hine v. Roberts, 48 Conn. 267.
Johnson v. Whittemore, 27 Mich. 463.
Mott v. Havana Nat. Bank, 22 Hun, 354.

Some courts have held that the vendor cannot retake the goods without notice, and a tender of the balance due is sufficient to give the vendee title.

People's Furniture Co. v. Crosby, 57 Neb. 282, 73 Am. St. R. 504.
See also *Cushman v. Jewell*, 14 N. Y. (Sup. Ct.) 525.

A promise to extend the time for paying an instalment is held to be a waiver of forfeiture for default thereon.

Cole v. Hines, 81 Md. 476, 82 L. R. A. 455, and note.

(3) A stipulation, however, that the vendor may retake upon default is valid.

Miller v. Steen, 89 Am. Dec. 128. (And see note to this case.)

(4) Leases.

Goods sold upon the instalment plan are often accompanied by a "lease," stipulating that the successive payments shall be applied as rent, and that when the total amount of the price is paid the chattel shall thereupon become the property of the person thus paying for it. Some courts have called these transactions sales despite the form of the contract. If, however, by the contract, the title is expressly reserved by the vendor, then the sale is a conditional one, and the title can be obtained by the vendee only upon paying the full price.

Murch v. Wright, 46 Ill. 487.

National Car Builder v. Cyclone Plow Co., 49 Minn. 125.

Hervey v. R. I. Locomotive Works, 93 U. S. 664.

Powell v. Ecker, 96 Mich. 538.

Hine v. Roberts, 48 Conn. 267.

Sargent v. Gile, 8 N. H. 325.

§ 85. Prepayment of the Price:

The question of title in connection with payment by instalments is, after all, but a phase of the more general question of prepayment of the price as a condition, precedent or concurrent, to the passing of the property. This is one of the most frequent illustrations of that class of conditional sales in which the vendee is to do something before the title passes. It is to be clearly kept in mind that prepayment is not *necessarily* a condition of the title, since by agreement of the parties the title may pass without payment; but, unless the contrary be intended, every sale *presumes* a cash payment, and there is no credit ex-

cept by agreement, express or implied. Therefore, in absence of such agreement, even though the goods be delivered to the vendee, the title does not pass before payment for the same.

Paul v. Reed, 52 N. H. 136.

Allen v. Hartfield, 76 Ill. 358.

Wabash Elevator Co. v. National Bank, 23 Ohio St. 311.

Hayden v. Demets, 53 N. Y. 426.

Davison v. Davis, 125 U. S. 91.

Richardson Drug Co. v. Teasdall, 52 Neb. 698, 72 N. W. R. 1028.

Fishback v. Van Dusen, 33 Minn. 111.

§ 86. Vendor's Title in Conditional Sales Against the Creditors and Subsequent Vendees of Original Vendee:

In case of conditional sales, let us suppose that the conditional vendee sells the property to a subsequent vendee, or suppose that a creditor of the original vendee attaches the goods, or the original vendee's assignee in bankruptcy takes possession of them, what is the *status* of the title, admitting that all such third persons act in good faith, and, therefore, no element of fraud is to be considered?

In principle, there should be but one answer to this question, because, no title ever having passed to the original vendee, he has no title to convey, or to be levied upon, and, therefore, the original vendor's title should be good against all such third persons. In view, however, of the supposed needs of trade, business policy, and the seemingly natural right of an innocent third person to rely upon the fact of possession by the original vendee, some courts hold that the title of such subsequent (innocent) third persons is good against the original vendor. Most courts, however, apply the correct principle, and hold that the original vendor's title is good against all such third parties.

(1) Holding Vendor's Title Good.

Federal Courts: Harkness v. Russell, 118 U. S. 663; The Marina, 19 Fed. R. 760.

Massachusetts: *Spooner v. Cummings*, 151 Mass. 313.
Connecticut: *Forbes v. Marsh*, 15 Conn. 384; *Crompton v. Beach*, 62 Conn. 25.
Indiana: *Bealls v. Stewart*, 109 Ind. 371. See, however, *Winchester Co. v. Carman*, 109 ib. 81.
Ohio: *Sanders v. Keber*, 28 Ohio St. 630.
Michigan: *Pettyplace v. Groton Bridge Co.*, 103 Mich. 155.
New Jersey: *Woolley v. Geneva Wagon Co.*, 59 N. J. L. 278.
Kansas: *Sumner v. McFarlan*, 15 Kan. 600; *Standard Co. v. Parlin Co.*, 51 Kan. 544; *National Bank v. Tufts*, 53 Kan. 710.

And many other states, which space prevents enumerating, hold to this same general doctrine.

(2) Holding Subsequent Vendees', etc., Title Good.

On the other hand, a few states, for the reasons previously given, hold that if innocent third persons have lawfully obtained possession of the property their title to it is good against the original vendor.

Colorado: *Harper v. People*, 2 Colo. App. 177.
Illinois: *Murch v. Wright*, 46 Ill. 487; *Van Duzor v. Allen*, 90 Ill. 499.
Maryland: *Butler v. Gannon*, 53 Md. 333. See also *Farmers' Phos. Co. v. Gill*, 69 Md. 537.
Kentucky: *Greer v. Church*, 13 Bush, 430.

(3) Qualifying the General Rule.

In several states, particularly in New York and Pennsylvania, the general rule is qualified by certain distinctions. Thus,—

New York: If the title is *expressly* reserved in the original vendor, then sub-vendees of the original vendee cannot acquire a title.

Ballard v. Burgett, 40 N. Y. 314.

If, however, the title is *not* expressly reserved in the original vendor, then the original vendee can give good title to subsequent purchasers, etc.

Comer v. Cunningham, 77 N. Y. 391.

Pennsylvania: The doctrine of *bailment* is applied here. That is, if the goods are delivered to the prospective vendee as a *bailee*, then third persons can acquire no title from him. In cases of *sale*, however, conditional upon payment, etc., it seems that innocent sub-vendees obtain title.

Stadtfeld v. Huntsman, 92 Pa. St. 53.

§ 87. Rule Affected by Statutes:

In many states there are now, however, statutes which regulate this question. The statutes require such conditional sales to be recorded, otherwise the original vendor's title shall not be good against innocent third parties. Such statutes have been passed in Connecticut, Delaware, Kansas, Maine, Missouri, Nebraska, New Jersey, New York, Ohio, and doubtless other states.

As to the requirement of recording when a sale is made between parties of different states, the *lex loci* of the sale applies.

Wooley v. Geneva Wagon Co., 59 N. J. L. 278, 35 Atl. R. 789.

Even under the statute *actual* notice is as effectual as the constructive notice of record.

National Bank v. Tufts, 53 Kan. 710.

As to conflict of state laws as to conditional vendor's title, see

Marvin Safe Co. v. Norton, 48 N. J. L. 410.

Baldwin v. Hill, 4 Kan. App. 168.

§ 88. Intention of the Parties:

It is important to repeat that the rules previously laid down for determining whether or not a sale is conditional are applicable only in case of the absence of evidence showing a contrary intention. It is clear, of course, that even if anything is to be done by either party as to weighing, testing, packing, etc., prior to de-

livery, nevertheless the parties may by express agreement stipulate that the title shall pass even before the doing of such thing. So payment, likewise, might be waived. The intention of the parties is the first rule, and, in absence of proof of that, the other rules referred to are to be applied. Therefore a sale which, by the foregoing rules, might appear to be conditional would, nevertheless, be absolute if such were the actual agreement.

On the other hand, however, an originally absolute sale cannot be converted by subsequent agreement into a conditional one, without change of possession, providing that such agreement would affect rights of subsequent purchasers or creditors without notice.

Wright v. Vaughn, 45 Vt. 369.

Caraway v. Wallace, 2 Ala. 542.

Houser & Haines Mfg. Co. v. Hargrove (Cal., 1900), 61 Pac. R. 660.

As an illustration of what will not constitute the waiver of a condition by one entitled to its benefit, see

Dowell v. Williams, 40 Kan. 753.

4. Goods Not Specified.

§ 89. It is clear that no title can vest in a chattel that is not specified or "appropriated" to the contract. This is illustrated in orders given for articles to be manufactured, and in case of goods that must be separated from a larger mass. We will take up the principles in order.

§ 90. Goods Unspecified, then Contract is Executory:

The principle that if the goods are unascertained or unspecified no title passes has been previously alluded to (§ 79), and, in theory, should be very clear; since, if the goods are unascertained, there is no specific chattel over which the vendee can assert ownership. In practice, however, it is frequently a matter of dispute whether or not the evi-

dence is sufficient to show a specification of the goods. Unless the goods are designated or appropriated to the contract, a mere *intention* to pass title to goods that are *unspecified* is clearly no passing of title to any specific subject-matter of sale, and the contract, therefore, remains executory.

Golder v. Ogden, 15 Pa. St. 528.
First Nat. Bank v. Crowley, 24 Mich. 492.
Randolph Iron Co. v. Elliott, 34 N. J. L. 184.
Ormsbee v. Machir, 20 Ohio St. 295.
Moline Scale Co. v. Beed, 52 Iowa, 307.
Howell v. Pugh, 27 Kan. 702.
Ober v. Carson, 62 Mo. 213.
Kohl v. Lindley, 39 Ill. 195.
Davis v. Budd, 60 Iowa, 144.

§ 91. But when Goods are Appropriated Title Passes:

At times the simplest circumstances are sufficient to "appropriate" the goods, and thus to pass title to the vendee. Appropriation may be made by simply setting apart the goods, marking them, or by other similar means.

Higgins v. Murray, 73 N. Y. 252.
Moody v. Brown, 34 Me. 107.
Winslow v. Leonard, 24 Pa. St. 14.
Home Ins. Co. v. Heck, 65 Ill. 111.
Banchor v. Warren, 33 N. H. 183.

§ 92. Termination of Election of Appropriation and Time of Passing of Title:

Simple as the statement of the rule regarding "appropriation" may seem, it is often, nevertheless, a perplexing one to apply. *When* are the goods appropriated, and exactly *when* does the title pass? Appropriation implies that both buyer and seller have assented to the specification of the goods, but, in the question now before us, and a question which frequently arises, the seller is presumed to be acting with the consent of the buyer, and has agreed to appropriate, or to set apart, the goods to the con-

tract. His act of appropriation, then, specifies the goods and executes the contract. When, however, in such cases is the seller's act *final*, and *when*, in consequence of such act, does the title pass? The seller may pick out certain goods *intending* to appropriate them to the contract, but he may change them again and again, if he pleases, until his election is terminated. When can he no longer exercise his election?

The rule as laid down by Lord Blackburn and Mr. Benjamin in such cases is substantially as follows: When an election is to be made, the party who has the first thing to do, having done that act which he could not have done unless appropriation were made, thus makes his election irrevocable. Thus the vendor has agreed to ship the goods. This is the first thing to be done. He does ship the goods. His election is ended, because he could not have performed this act unless he had appropriated or specified the goods. Hence, one of the most common illustrations of appropriation of the goods is by delivering them to the carrier, and this act, unless the *jus disponendi* of the goods has been reserved (see § 97), is sufficient, generally, to pass the title.

Philadelphia R. R. Co. v. Wireman, 88 Pa. St. 264.

Krulder v. Ellison, 47 N. Y. 36.

Stafford v. Walter, 67 Ill. 83.

Leggett Tobacco Co. v. Collier, 89 Iowa, 144.

Whiting v. Farrand, 1 Conn. 60.

Glass v. Goldsmith, 22 Wis. 488.

Shawhan v. Van Nest, 25 Ohio St. 490.

Rider v. Kelley, 32 Vt. 268.

§ 93. Rules as to Portion of Uniform Mass:

It is evident that there is a difference in principle between the necessity of appropriation or of separation from a larger stock or mass where the units of the whole quantity vary in quality or value, and where there is no appreciable difference between them. For example, an

order for a hundred head of cattle from a larger herd, or for twenty sheep from a larger flock, requires an actual separation of the same in order to appropriate them to the contract, it being conceded that the cattle or sheep are not all of the same value. Consequently the rule in such cases is the general one before given, namely, that no title passes until, in accordance with the contract, the goods are appropriated.

Where, however, the larger stock or mass is all of one or of an uniform quality, such as an order of ten barrels of flour from a larger number of barrels, the quality and quantity in each barrel being the same, or of oil or coal from a larger quantity in one tank or bin, then the question is a different one. There is no occasion for preference in such cases, since one unit is equal to every other unit. In such cases, consequently, does title to the quantity ordered pass to the vendee without separation? This question is answered both affirmatively and negatively by the different states, and the rule, therefore, depends upon the jurisdiction.

§ 94. The following states apply the general rule of the necessity of appropriation, making no exception in cases of uniform mass: Massachusetts (although some of the earlier cases inclined the other way), Ohio, Pennsylvania, Iowa, New Hampshire, California, Georgia, Indiana, Kansas, Kentucky, and doubtless other states.

Scudder v. Worster, 11 Cush. 573.

N. E. Co. v. Standard Worsted Co., 165 Mass. 329.

Woods v. M'Gee, 7 Ohio St. 467. (In this case the value varied, but the doctrine was approved.)

Haldeman v. Duncan, 51 Pa. St. 66.

Courtright v. Leonard, 11 Iowa, 32.

Commercial Bank v. Gillette, 90 Ind. 268.

Bailey v. Long, 24 Kan. 90.

Brewing Ass'n v. Nipp, 6 Kan. App. 730.

See also Howell v. Pugh, 27 Kan. 702.

Ferguson v. Northern Bank, 14 Bush, 555.

§ 95. On the other hand, the following states have held that in case the mass is uniform no separation is necessary in order to pass the title, provided such be the intention of the parties: New York, Minnesota, Virginia, Connecticut, New Jersey, Michigan, and others.

Pleasants v. Pendleton, 6 Rand. (Va.) 473.

Kimberly v. Patchin, 19 N. Y. 330.

Russell v. Carrington, 42 N. Y. 118.

Mackellar v. Pillsbury, 48 Minn. 396.

Chapman v. Shepard, 39 Conn. 413.

Merchants' Bank v. Hibbard, 48 Mich. 118.

But see Hahn v. Fredericks, 30 Mich. 223. (In this case, however, a sale of wood, there was a mingling of qualities.)

Hurff v. Hires, 39 N. J. L. 4.

§ 95a. The cases upon this important question, as to the need or not of a separation from a uniform mass in order to pass title, require, however, even in the same jurisdiction, careful discrimination. Some of them turn upon the fact that there were distinguishing marks or signs upon some of the articles, or upon the boxes or barrels in which they were contained; thus affording discrimination; others emphasize the clear intention of the parties to pass title; still others are influenced by the fact that the *whole* mass was delivered to the vendee, and the portion desired was to be taken out by him. Some few of the states, also, are not very positive in the position which they have taken, and, therefore, it is important that in each jurisdiction, in case of application of the doctrine, the whole subject should be reviewed through all the decisions of the particular jurisdiction.

§ 96. *Elevator and Pipe-line Cases:*

Closely connected with the foregoing questions are the, so called, grain-elevator and pipe-line cases. The owners of grain, oil and other merchandise store their property in these special kinds of warehouses, and, receiv-

ing certificates of storage, buy and sell such certificates, the contract of such sales conveying the respective goods without specification or "appropriation," although these portions sold are undivided parts of a uniform mass. This prevailing rule seems to be inconsistent with the rule held in some states, that an appropriation is necessary when the goods sold are portions of a uniform mass, and it is, in the more recent cases, said that the explanation is that the goods are all owned by a "*tenancy in common*," and that the transfer of the certificate of storage merely transfers the previous owner's share in the common mass. This, however, cannot be true, since the grain or oil is being drawn out daily, and the grain or oil that one owner puts in to-day is drawn out, it may be, to-morrow to meet some certificate demanding delivery. The expression *tenancy in common* is also objectionable because such an ownership applies, properly, to lands. These transactions have also been called ordinary sales, and they have been called bailments. They are, strictly, neither. They are not sales, since, under the circumstances, no title can be given to *any* undivided portion of the identical mass as stored. They are not bailments, since in a bailment one is to receive the article or materials deposited. In the cases before us the vendee receives only an equivalent. They are, practically, examples of the contract of *mutuum* in the Roman law. The vendee receives, in return for the wheat, say, deposited, an equal number of bushels of other wheat, consisting of grains totally different from those stored. It is just as good, however, as if the identical grains were delivered to him. The certificates of deposit are honored, upon presentment by the lawful holders, as are checks upon a bank. The elevator company's contract is merely to deliver to the order of the depositor as many bushels of as equally good wheat as he deposited. Despite these clear principles, the pecu-

iar exigencies of the transactions have influenced the decisions, which have, generally, treated these transactions as sales, much to the confusion of terms.

Chase v. Washburn, 1 Ohio St. 244.
Arthur v. Chicago R. R. Co., 61 Iowa, 648.
Rice v. Nixon, 78 Ind. 97.
Dole v. Olmstead, 36 Ill. 150.
Cloke v. Shafroth, 137 Ill. 393.
Henderson v. Lauch, 21 Pa. St. 359.
Hutchinson v. Com., 82 Pa. St. 472.
Hall v. Pillsbury, 43 Minn. 33, 7 L. R. A. 529, and note.
Drudge v. Leiter (Ind., 1898), 49 N. E. R. 34.
Bryan v. Congdon, 54 Kan. 109.

5. RESERVATION OF THE JUS DISPONENDI.

§ 97. As a fifth subdivision of the effect of the contract upon title, we take up the consideration of the reservation of the *jus disponendi*, or the right of disposal of the goods. After the goods have been appropriated to the contract so that nothing more remains to be done for the purpose of ascertaining and setting apart the goods, and even after the goods have been delivered to the common carrier for shipment to the vendee, yet if the evidence shows that it is still the intention of the vendor that title shall not pass till the goods are paid for, then the intention prevails and no title passes.

As we have before stated, the rules laid down by the courts in cases of disputed or doubtful title are for the very purpose of determining, by the judicial construction put upon the facts connected with the particular case, what the intention of the parties was. If, despite such circumstances, it is clear what the intention was, then, in general, the intention governs.

When the vendor has appropriated the goods to the contract, and has delivered the same to the common carrier, then, unless it appears that the common carrier is the agent of the *vendor*, it is the universal rule, in ab-

sence of other evidence, that the delivery is complete, and that the title passes. If, however, on the contrary, it appears that the vendor did not intend to part with the goods before payment for the same, as by making the carrier the agent of the vendor, or by other means reserving to himself the right to yet dispose of the goods, that is, the *jus disponendi*, the title does not pass, but remains in the vendor.

The most familiar illustration of this reservation of the right of disposal is seen in vendors taking out bills of lading in their own favor as consignees, which fact, in itself, is *prima facie* evidence that the vendor intends to reserve the title. The bill of lading (applied originally to the written instrument of contracts for sea carriage, but now to all contracts of carriage, just as the word "shipment" has expanded from water carriage to carriage over either land or sea) by mercantile law becomes the symbol of the goods carried, and, when the bill of lading is indorsed or delivered to another, the latter may by virtue of its lawful possession demand the goods when conveyed by the carrier to the destination. The vendor, therefore, by taking out the bill of lading in his own name may transmit it to his agent, or through his banker to the latter's correspondent at the place of destination, and the agent or bank will then upon payment for the goods by the purchaser deliver to him the bill of lading.

Dows v. National Exchange Bank, 91 U. S. 618.

First Nat. Bank v. Dearborn, 115 Mass. 219.

Farmers' & Mechanics' Bank v. Logan, 74 N. Y. 568.

Bergeman v. Railroad Co., 104 Mo. 77, 15 S. W. R. 992.

Ward v. Taylor, 56 Ill. 494.

§ 98. *Exception to the Rule:*

The taking out of the bill of lading in the vendor's own name as consignee is, however, to repeat, only *prima facie* evidence of the vendor's intention to reserve title,

and other circumstances, such as proof of the vendor's acting as agent for the vendee in thus taking out the bill of lading, will rebut the presumption.

Merchants' Nat. Bank v. Bangs, 102 Mass. 291.

Hobart v. Littlefield, 13 R. I. 341.

§ 99. *Title in C. O. D. Cases:*

If the buyer directs goods to be forwarded to him by express, C. O. D., it seems difficult, upon principle, to come to any other conclusion than that the payment for the goods is by the contract a condition concurrent with the passing of the property, and, therefore, that the title does not pass till the goods are paid for, causing, under this view, the sale to be executed at the place of delivery rather than at the place of shipment.

Nevertheless the weight of authority is contrary to this principle, it being held by most states which have considered the question, that the *title* passes upon delivery to the carrier, but that *possession* only is reserved by the vendor till payment.

(1) Holding that title *passes upon delivery to carrier*:

Com. v. Fleming, 130 Pa. St. 138.

Brechwald v. People, 21 Ill. App. 213.

State v. Peters, 91 Me. 31.

Higgins v. Murray, 73 N. Y. 252.

State v. Carl, 43 Ark. 353, 51 Am. R. 565.

(2) Holding that title *does not pass until payment*:

State v. O'Neil, 58 Vt. 140.

Wagner v. Hallack, 3 Colo. 176. See also *O'Neill v. Vermont*, 144 U. S. 323.

U. S. v. Shriver, 23 Fed. R. 134.

U. S. v. Cline, 26 Fed. R. 537.

PART III.

AVOIDANCE OF THE CONTRACT.

§ 100. In discussing the formation of the contract, reference was made to the effect of mistake upon the question of mutual assent, in connection with which we saw that in certain cases the mistake might be of such a nature as to make void the assent, and thus prevent the very formation of the contract. There are other cases, however, in which the contract, although entered into under mistake, may yet be avoided by one or by both of the parties. Furthermore, in addition to mistake, other circumstances connected with the negotiations, or certain matters of fact or of law relating to the contract, will render the same either absolutely void or voidable. These matters are those of fraud and of illegality. First, however, let us consider the effect of mistake.

1. MISTAKE.

§ 101. Mistake may be defined as an erroneous mental condition at the time of the contract and in connection with the contract. It is ignorance caused by a mutual misunderstanding, and the same mistake which renders void an executory contract is sufficient to rescind the contract after execution. To render a contract voidable on the ground of *mistake*, it must be a *mutual* mistake, and a mistake of *fact*, not of *law*.

§ 102. *Ex Parte* Mistake:

A mistake on the part of only one of the contracting parties will be either known or unknown to the other

party. If it is known, then, in general, it will be fraud on the part of the person knowing of it, and the contract, therefore, may be avoided on that ground; if it be unknown to the other contracting party, then the mistaken party must abide by the results of his error. For example (to use Mr. Benjamin's illustration), if there be two ships by the name of *The Peerless*, and the vendor has in mind the cargo of one ship as the subject-matter of the sale, and the vendee has in mind the cargo of the other ship, then the mistake is mutual, and there is no contract. If, on the other hand, there be but one ship *Peerless*, and the vendor sells and the vendee buys the cargo of that ship, it is no excuse for the vendee to say, after discovering his error, that he meant the cargo of the *Peeress*.

Scott v. Hall, 46 Atl. R. 611 (N. J., 1900).

Griffin v. O'Neill, 48 Kan. 117 (reversing s. c., 47 Kan. 116).

§ 103. *Mutual Mistake:*

Either party may rescind, providing the other party can be placed *in statu quo*.

Kimball v. Cunningham, 4 Mass. 502.

Dill v. O'Ferrell, 45 Ind. 268.

Babcock v. Case, 61 Pa. St. 427.

Burton v. Stewart, 3 Wend. 236.

Grymes v. Sanders, 93 U. S. 55.

§ 104. *Mistake Must be of Fact, Not of Law:*

Here the axiom *ignorantia legis neminem excusat* applies. There are some cases, however, where equity will give relief for some mistakes of law, but even these are rare.

Hunt v. Rousmaniere, 1 Pet. 15.

Hepburn v. Dunlop, 10 Wheat. 179.

Storrs v. Barker, 6 Johns. Ch. 51.

Northrop v. Graves, 19 Conn. 548.

§ 105. *Character of the Mistake:*

The mistake may be founded upon various errors, such as the existence of the consideration, identity or

species of the article sold, identity of the person contracted with, etc. If there is a failure of the consideration, or a mistake as to the identity or species of the subject-matter, then the sale may be rescinded. As to the person, if the mistake be *material*, as, for example, involving the solvency of the vendee, then this circumstance would render, generally, the sale voidable. In regard to the *quality* of the article, the doctrine of *caveat emptor* applies. Concerning the failure of consideration, it must be remembered that the erroneous judgment of the vendee as to the worth of the article for his prospective purpose is not the test, for if the vendee gets by the purchase just what he bargained for there is no failure of consideration.

Consumers Ice Co. v. Webster, 32 App. Div. (N. Y.) 592.
Sherwood v. Walker, 66 Mich. 568, 33 N. W. R. 919.
Hartford, etc. R. R. Co. v. Jackson, 24 Conn. 514.
Webb v. Odell, 49 N. Y. 585.
Utley v. Donaldson, 94 U. S. 29.
Boston Ice Co. v. Potter, 128 Mass. 28.
Hamet v. Letcher, 27 Ohio St. 356.
Wood v. Boynton, 64 Wis. 265, 25 N. W. R. 42.

2. FRAUD.

§ 106. In "Mistake" we saw that the contract might be avoided through ignorance caused by a mutual misunderstanding. We may speak of fraud as an ignorance caused by a wilful inducement on the part of one of the parties. The essential elements of fraud are intention, deception, materiality, reliance, loss. Fraud may be practiced on the vendor or on the vendee. It may be practiced in many ways, from positive statement to mere silence, that is, by a suppression of the truth when the other party has a right, under the circumstances, to know the truth. Fraud does not render the contract void, although frequently so said, but gives the defrauded party the right to avoid the sale, if he wishes to make that election.

§ 107. General Principles Relating to Fraud:

(1) Renders the contract voidable.

Hewitt v. Clark, 91 Ill. 605.

Bell v. Cafferty, 21 Ind. 411.

Rowley v. Bigelow, 12 Pick. 307, 23 Am. Dec. 607.

Baird v. New York, 96 N. Y. 567.

(2) But the contract must be avoided, if at all, within a reasonable time.

Arnold v. Hagerman, 14 Am. St. R. 724.

Boles v. Merrill, 173 Mass. 491, 73 Am. St. R. 308.

Pence v. Langdon, 99 U. S. 578.

Cox v. Montgomery, 36 Ill. 396.

(3) But a vendor, seeking by replevin to recover goods from fraudulent vendee, is not required to give prior notice of rescission, nor to make demand.

John S. Brittain Co. v. Merkel (Kan., 1900), 61 Pac. R. 675.

Butters v. Haughwout, 42 Ill. 18.

Parrish v. Thurston, 87 Ind. 437.

(4) Fraud may be practiced, in some cases, by suppression of the truth, silence, fraudulent concealment.

Cecil v. Spurger, 32 Mo. 462.

Dinsmore v. Tidball, 34 Ohio St. 418.

Stewart v. Wyom. Cattle Ranche Co., 128 U. S. 383.

Bartholomew v. Warner, 32 Conn. 98.

Bridger v. Goldsmith, 143 N. Y. 424.

§ 108. Necessary Elements of Fraud:

(a) Must be material.

Greenleaf v. Gerald (Me., 1900), 46 Atl. R. 799.

Farnsworth v. Duffner, 142 U. S. 43.

Stevens v. Allen, 51 Kan. 144.

(b) Must be intentional.

Nash v. Minn. Title Ins. Co., 163 Mass. 574, 47 Am. St. R. 489.

Crowell v. Jackson, 53 N. J. L. 656.

Kountze v. Kennedy, 147 N. Y. 124.

(c) Must be calculated to deceive.

Whiting v. Hill, 23 Mich. 399.
Farrar v. Churchill, 135 U. S. 609.
Hagee v. Grossman, 31 Ind. 223.
McGar v. Williams (Ala.), 62 Am. Dec. 739.
Elerick v. Reid, 54 Kan. 579.

(d) Must be a reliance upon the representations.

Ming v. Woolfolk, 116 U. S. 599.
Bennett v. Gibbons, 55 Conn. 450.
Wood v. Staudenmayer, 56 Kan. 399.
Arnold v. Norfolk Hosiery Co., 148 N. Y. 392.

(e) Must be a loss.

Keller v. Johnson, 11 Ind. 337.
Pheteplace v. Eastman, 26 Iowa, 446.
Bristol v. Braidwood, 28 Mich. 191.
Michigan v. Phoenix Bank, 33 N. Y. 9.

§ 109. *Fraud on the Vendor:*

(1) May be caused by misrepresentations of vendee as to his ability to pay.

Standard Horseshoe Co. v. O'Brien (Md., 1900), 46 Atl. R. 346.
Judd v. Weber, 55 Conn. 267.
Morse v. Shaw, 124 Mass. 59.
Work v. Jacobs, 35 Neb. 772.

But a false statement by vendee as to his financial condition, not made with fraudulent intent, *held* to be mere *opinion* only.

White v. Fitch, 19 R. I. 687, 36 Atl. R. 425.
South Branch Lumber Co. v. Ott, 142 U. S. 622.
Dilworth v. Bradner, 85 Pa. St. 238.

(2) Not intending to pay.

The general rule is that if the vendee does not intend to pay, this fact will, *per se*, render the sale voidable.

Watson v. Silsby, 166 Mass. 57.
Frisbee v. Chickering, 115 Mich. 185, 73 N. W. R. 112.
Hall v. Naylor, 18 N. Y. 588.

A few cases, however, hold *contra*, that is, that the mere intention not to pay will not render the sale voidable unless there is an employment of artifice.

Bughman v. Central Bank, 159 Pa. St. 94.

Cincinnati Cooperage Co. v. Gaul, 170 Pa. St. 545.

Mere insolvency does not render the sale voidable.

Diggs v. Denny (Md., 1897), 37 Atl. R. 1037.

Kelsey v. Harrison, 29 Kan. 143.

Morrill v. Blackman, 42 Conn. 324.

And an intention to pay if accompanied with fraud will render the contract voidable.

Judd v. Weber, 55 Conn. 267.

§ 110. *Effect of Subsequent Sale or Attachment:*

Whether or not a fraudulent vendee, before rescission by vendor, can make a valid sale of the goods concerned, or whether they can be attached by a creditor of the fraudulent vendee, depends upon the character of the fraud. If the fraud goes to the very formation of the contract, or is fundamental, then the subsequent sale would be invalid should the original vendor desire to pursue the goods. If, however, the nature of the fraud is but incidental, or merely influences the formation of the contract, then the better rule is that the vendee may convey to an innocent sub-vendee a valid title.

Rodliff v. Dallinger, 141 Mass. 1. See, however, Truxton v. Fait & Slagle Co. (Del., 1899), 1 Pennewill, 483, where a distinction is drawn between purchaser and attaching creditor, holding title *good* in case of purchaser, but that defrauded vendor may rescind in case of creditor. See, also, Schloss v. Feltus, 103 Mich. 525, 36 L. R. A. 161, and note. This case *holds* that a pre-existing debt as a consideration for the transfer of a stock of goods will not defeat right of original vendor who alleges fraud in the purchase from him.

§ 111. *Vendor's Remedies:*

The vendor in seeking his goods by replevin suit must return purchase-money (if paid) as a condition precedent. This is the general rule.

Parrish v. Thurston, 87 Ind. 437.

Matteawan Co. v. Bently, 13 Barb. 641.

Contra, *Sisson, Potter & Co. v. Hill*, 18 R. L. 212, 21 L. R. A. 206; and see note to last citation.

§ 112. *Fraud on the Vendee:***(1) Actual misrepresentation.**

Elerick v. Reid, 54 Kan. 579, where vendor selling goods "at cost" misrepresented meaning of price-marks.

(2) Concealment of material facts.

For example, if the vendor knowing of the fact fails to disclose hidden diseases in animals offered for sale, this is held to be fraud.

Paddock v. Strobridge, 29 Vt. 471.

Grigsby v. Stapleton, 94 Mo. 423.

Stewart v. Wyoming Ranch Co., 128 U. S. 383.

(3) Praise of one's goods, that is, mere "dealer's talk," is not, however, fraud, since this is regarded as mere "opinion."

Ellis v. Andrews, 56 N. Y. 83.

Hickey v. Morrell, 102 N. Y. 454.

As to effect of representing things to be "good," see
Crane v. Elder (Kan.), 15 L. R. A. 795, and note there.

(4) Fraud by agent is fraud of principal.

Johnson v. Barber, 10 Ill. 426.

Reynolds v. Witte, 18 S. C. 5, 36 Am. R. 678.

Fifth Ave. Bank v. Railroad Co., 137 N. Y. 231.

People v. Parks, 49 Mich. 333.

Com. v. Nichols, 10 Met. 259, 43 Am. Dec. 432.

City Nat. Bank v. Dun, 51 Fed. R. 160.

(5) Fraud at auction sales, by enhancing bids, hired "puffers," etc.

Mapps v. Sharpe, 32 Ill. 13.

Benz v. Hines, 3 Kan. 390.

Peck v. List, 23 W. Va. 338, 48 Am. R. 398.

Veazie v. Williams, 8 How. 153.

Durfee v. Moran, 57 Mo. 374.

Fisher v. Hersey, 17 Hun, 370.

§ 113. *Vendee's Remedies:*

The defrauded vendee has an election, in general, of the following remedies:

1. Return the goods, recover the price (if paid), or refuse to pay (if price is unpaid).

2. Keep the goods, and (if price is unpaid) when sued for price plead the fraud in defense.

3. Keep the goods, and (price being paid) sue in tort. Measure of damages is difference between *actual* and *represented* value (as paid). In some cases consequential damages may be recovered.

Lynch v. Mercantile Trust Co., 18 Fed. R. 486.

Stiles v. White, 11 Met. 356.

Fox v. Tabel, 66 Conn. 397.

Page v. Parker, 40 N. H. 47. (Consequential damages.)

Jex v. Straus, 122 N. Y. 293.

4. File bill in equity to set aside the sale, if the remedy at law is not adequate.

Veazie v. Williams, 8 How. (U. S.) 184.

§ 114. *Election of Remedies:*

The vendee must elect. He cannot affirm the sale, and subsequently treat it as avoided.

Droege v. Ahrens & Ott Mfg. Co., 163 N. Y. 466 (1900).

§ 115. *Fraud on Creditors:*

Thus far in treating the question of fraud we have considered the subject from the standpoint of only the

parties to the contract. We have now to consider third persons, or creditors of the vendor, who are naturally interested in the assets of their debtor, and who have a right to be protected in their lawful claims against fraudulent conveyances on the debtor's part. This right is recognized both by the common law and by statute.

(1) To constitute fraud on creditors of the vendor (the only third parties who can, of course, be interested), there must be, generally, a *mutual* intention on the part of *both* vendor and vendee to defraud. Whether there be fraud or not is, of course, a matter of fact, and the circumstances are the evidence. An intention to defeat a creditor's execution is not fraud if full consideration be paid by the *bona fide* vendee, but valuable consideration may also be accompanied by fraud. But a fraudulent vendee may, before the creditor asserts his right, make his title good by renouncing the fraud and paying full value. If the vendor only be guilty of fraud, the *bona fide* vendee, for consideration, obtains a valid title.

Spring Lake Iron Co. v. Waters, 50 Mich. 13.

Hessing v. McCloskey, 37 Ill. 341.

Oriental Bank v. Haskins, 3 Met. 332.

Elliott v. Stoddard, 98 Mass. 145.

Nugent v. Jacobs, 103 N. Y. 125. (Holding that payment is not conclusive proof.)

Wilson v. Fuller, 9 Kan. 176 (cited in 30 Kan. 355).

§ 116. *Legislation:*

In many of our states statutes have been passed to regulate this subject; such legislation being based upon the English statutes of 13 Eliz. (1572), and 27 Eliz. (1586). The latter statute (27 Eliz., c. 4) applies to fraudulent conveyances of *lands* designed to cheat subsequent *purchasers*, and, therefore, does not concern our present inquiry. The statute of 13 Eliz., c. 5 (generally referred to in this connection as "The Statute of Elizabeth"), was

confirmed and made perpetual by the statute of 29 Eliz., c. 5 (1588), and covered fraudulent sales or conveyances of all kinds of property, *with intent "to delay, hinder or defraud creditors,"* making such sales *utterly void* as to the *creditors*, though not affecting (as often erroneously supposed) the validity of the sale between the *parties*. It should be borne in mind that in such sales the parties themselves are bound. They cannot complain of the fraud upon the creditor. It is for him to do that.

This statute of Elizabeth, however, is but declaratory of the common law, and states in which no similar statute has been enacted have by force of the common law *held* such sales void as to the defrauded creditor.

Baker v. Humphrey, 101 U. S. 494.

Ewing v. Runkle, 20 Ill. 449.

Peck v. Land (Ga.), 46 Am. Dec. 368.

Butler v. Moore, 73 Me. 151.

Byrnes v. Volz, 53 Minn. 110, 54 N. W. R. 942.

§ 117. *Preferred Creditors:*

In absence of statute governing the question, it is not a fraud upon other creditors to show a preference to certain creditors by paying their claims first, in full, or in transferring property to them in consideration of such claims, providing the transaction be *bona fide*.

Dudley v. Danforth, 61 N. Y. 626.

Warner Glove Co. v. Jennings, 58 Conn. 74, 19 Atl. R. 239.

Tootle v. Coldwell, 30 Kan. 134.

York Co. Bank v. Carter, 38 Pa. St. 453.

Sartwell v. North, 144 Mass. 192.

§ 118. *Who are "Creditors?"*

The question often arises whether or not certain persons who base their claims upon particular transactions or upon rights to remedies are included within the expression "creditors." The following principles are the results of

judicial decision, which *hold* that the following classes of claims are included in the meaning of "creditors:"

1. Claims maturing before the sale.
2. Claims *created* before but *maturing* after the sale.
3. Claims originating after the sale.
4. Claims arising from *tort* as well as from *contract*.

Fox v. Hills, 1 Conn. 295.

Jones v. King, 86 Ill. 226.

Hook v. Mowre, 17 Iowa, 197.

Dodd v. Adams, 125 Mass. 398.

§ 119. *Continued Possession by Vendor:*

The question of fraud being one of fact to be determined by the evidence, it frequently happens, in cases of alleged fraud upon creditors, that the continued possession and use by the vendor of the chattel which is the subject of the sale is evidence of the highest importance, some courts going so far as to say that this fact alone is sufficient to *conclusively* establish fraud. The subject is controlled by statute in some states. In the great number of decisions upon this question, three different rules have been laid down in various jurisdictions, as follows:

(1) Continued possession or retention of the goods by the vendor is, as a matter of *law*, a *conclusive* badge of fraud.

Patten v. Smith, 5 Conn. 196.

Mead v. Noyes, 44 Conn. 487.

Dunning v. Mead, 90 Ill. 376.

Hildreth v. Fitts, 53 Vt. 684.

Stern v. Henly, 68 Mo. 262 (now governed by statute); *Crawford v. Davis*, 99 Pa. St. 576.

(2) Such retention is, as a matter of *law*, *prima facie* fraud.

Warner v. Norton, 20 How. 448.

Smith v. Craft, 123 U. S. 436.

Seavey v. Walker, 108 Ind. 78. (Statute.)
Frankhouser v. Ellett, 22 Kan. 127. (Statute.)
Harlow v. Hall, 132 Mass. 232.
Steele v. Benham, 84 N. Y. 634. (Statute.)
Collins v. Meyers, 16 Ohio St. 547.
Williams v. Porter, 41 Wis. 422. (Statute.)

(3) Such retention is neither conclusive nor *prima facie* fraud, as a matter of *law*, but it is for the *jury* to consider with the other evidence, in order to determine whether or not there was fraud as a matter of *fact*.

Carpenter v. Graham, 42 Mich. 191. See also 91 Mich. 328.
Mackellar v. Pillsbury, 48 Minn. 396. (Statute.)
Collins v. Taggart, 57 Ga. 355.

§ 120. *Delivery Sufficient to Pass Title against Creditors:*

Since the doctrines in the foregoing cases as to fraud against creditors are based upon the fact of the retention (or the non-delivery) of the goods by the vendor, it is important to determine what will constitute a sufficient delivery in such cases in order to pass, against creditors, the title. As we shall see further on, under the general consideration of DELIVERY, the term has a different meaning in different circumstances, and a "delivery" sufficient for one legal purpose might not suffice for another. As regards delivery sufficient to pass title against creditors, the circumstances of each case must govern. If, from their character, the goods are incapable of manual delivery, then a constructive or symbolic delivery will be sufficient. Some courts, influenced by their general attitude upon the presumptions of fraud in cases of retention, *hold* that the vendor cannot retain possession as bailee for the vendee, while others *hold* that if the vendor be bailee, in good faith, then delivery sufficient to pass title has been made. The acts of the parties concerned are also evidence of the delivery, such, for example, as branding cattle, changing

signs at a shop where a stock of goods is sold, or any other open acts indicative of ownership on the part of the vendee. The following cases will more fully illustrate these principles:

Morton v. Ragan, 5 Bush, 335. (Crops in the field.)
Jewett v. Warren, 12 Mass. 300. (Heavy articles.)
Rozier v. Williams, 92 Ill. 187. (Heavy articles.)
Woods v. Hull, 81 Pa. St. 451. (Goods with a bailee.)
Russell v. O'Brien, 127 Mass. 349.
Goodheart v. Johnson, 88 Ill. 58.
Evans v. Scott, 89 Pa. St. 136. (The last three cases hold that vendor may act as bailee for vendee.)
Ruddle v. Givens (Cal.), 18 Pac. R. 421. (*Contra* to preceding.)
See also Walden v. Murdock, 23 Cal. 533. (Branding cattle.)
Brown v. Kimmel, 67 Mo. 430.
Hull v. Sigsworth, 48 Conn. 258.

3. ILLEGAL SALES.

§ 121. The third division in the discussion of the "Avoidance of the Contract" is that of sales which are void on the ground of their illegality, either by force of the common law or by statute. The effect of illegal sales is that if the contract be executory, neither party can enforce by legal action its terms. If it be executed by both parties, neither party can obtain redress; the law leaves the parties where they are. If, however, a contract of sale has been entered into for some illegal purpose, and if the vendee has paid, partly or wholly, for the goods, or the vendor has made partial or complete delivery of them, then such performing party, before the illegal purpose has been carried out, and upon disaffirmance of the contract upon the ground of its illegal object, may recover the money paid, or the goods delivered. This rule presupposes, of course, that the sale itself was not illegal, *per se*, but only in its ulterior purpose. The doctrine regarding the non-enforcement of illegal sales is based upon the theory of impossibility, since it becomes

impossible by law. This principle also applies to sales that were legal when entered into, but which, before execution, have become illegal by statute.

Presby. Church v. City of N. Y., 5 Cow. 538. (Sale of land.)
Foster v. Thurston, 11 Cush. 322.
Materne v. Horwitz, 101 N. Y. 469.
Penn v. Bornman, 102 Ill. 523.
Pike v. King, 16 Iowa, 49.
Chestnut v. Harbaugh, 78 Pa. St. 473.
Congress & Empire Spring Co. v. Knowlton, 103 U. S. 49.
Adams Exp. Co. v. Reno, 48 Mo. 264.
Taylor v. Bowers, 1 Q. B. D. 291.
Finn v. Donahue, 35 Conn. 216.'

§ 122. *Sales Illegal at Common Law:*

Sales of things that violate public decency and morality, such as sales for the purposes of prostitution, obscene books, pictures, representations, etc.; sales of poisons or drugs for effecting some criminal design; sales of any articles for the perpetration of crime, or for the accomplishment of some illegal purpose, the vendor participating in the intent; sales of public office or of official influence; sales of recommendations, whereby the vendor as a presumably disinterested person is to recommend the vendee; sales to the public enemy,—are, in general, absolutely void at the common law.

Some sales are illegal, therefore, on account of the consideration, others on account of the party, *e. g.*, a public enemy, and still others because the thing, although innocent in itself, and under other circumstances the subject of a valid sale, is to be used for some illegal purpose.

Mitchell v. Scott, 62 N. H. 596.
Filson v. Himes, 5 Pa. St. 452.
Bollman v. Loomis, 41 Conn. 581.
Hanauer v. Doane, 12 Wall. 342.
Ashley v. Dillon, 19 Mo. 619. (Bribery.)
Marshall v. Railroad Co., 16 How. 314. (Lobbying.)
Creekmore v. Chitwood, 7 Bush, 317. (Smuggled goods.)

§ 123. As to General Restraint of Trade:

In the early English law all contracts in restraint of trade and occupation were declared illegal. This rule was caused, largely, by the English system of long apprenticeships. The recognized rule of modern times is that contracts may legally be made for the restraint of trade as to particular times and places, but that contracts for the *general* restraint of trade or commerce, applying to all places, are illegal. This question, however, has no direct bearing upon the subject of sales. It is occasionally raised, however, in connection with the selling of one's business or stock in trade, and then becomes of interest, collaterally.

Alger v. Thacher, 19 Pick. 51.

Smalley v. Greene, 52 Iowa, 241.

Sander v. Hoffman, 64 N. Y. 248.

Trenton Potteries Co. v. Oliphant, 56 N. J. Eq. 680.

§ 124. Vendor's Knowledge of Illegal Purpose:

As to the effect of the knowledge, on the vendor's part, of the intended illegal purpose or use of the goods sold, the courts are not in harmony. An attempt is made to draw a distinction between mere *knowledge* of such purpose, which in itself, it is said, does not invalidate the sale, and a *participation* in such intent by the vendor. Some also distinguish between the character or degree of the illegal purpose, such as *mala prohibita* and *mala in se*. A number of the decisions is based upon sales that are illegal by some statute, such, for example, as selling in a license state alcoholic liquors, knowing that the same are to be sold in some other state where such sales are illegal. The true principle, it is contended, in all such cases, is that if the evidence shews that the seller knew of the illegal purpose, then he should not be allowed to recover. There can be, in principle, no difference between *mala prohibita* and *mala in se*. If a vendor in one county where intox-

cants are legally sold makes a sale of such liquors to one who the vendor *knows* is buying them to sell illegally, in another county or state, the sale is just as illegal on the vendor's part as if he sold a rifle knowing that the same was to be used in committing murder. The heinousness of the illegal act does not change the fact of illegality, but only its class. Indeed, many of the courts which say that mere knowledge is not sufficient to deprive the vendor of his right to recover, nevertheless admit that if such vendor *participates* in the *intent*, as, for example, by packing the goods in such a way as to enable the vendee to carry out more successfully his illegal object, then he cannot recover. Such acts of the vendor are only evidence of his guilty knowledge, and granting that the vendor really *knows*, the true principle is that such knowledge invalidates the sale. The later English cases, moreover, adopt this view, although it must be admitted that the weight of authority in this country is against the view here taken, most of the courts holding that mere knowledge is not sufficient to defeat the right of the vendor to recover.

State v. Blakeman, 49 Mo. 604.
Graves v. Johnson, 156 Mass. 211, 15 L. R. A. 884, and note.
Davis v. Bronson, 6 Iowa, 410.
Materne v. Horwitz, 101 N. Y. 469.
Hull v. Ruggles, 56 N. Y. 424.
Chamberlain v. Fisher (Mich.), 75 N. W. R. 931.
Michael v. Bacon, 49 Mo. 474.
Frohlich v. Alexander, 36 Ill. App. 428.
Brunswick v. Valleau, 50 Iowa, 120.
Webber v. Donnelly, 33 Mich. 469.
Bickelly v. Sheets, 24 Ind. 1.
Feineman v. Sachs, 33 Kan. 621.
Tracy v. Talmage, 14 N. Y. 162.
Tuttle v. Holland, 43 Vt. 542.

§ 125. *Sales of the Nature of Wagers:*

Although at the common law there is nothing illegal in a wager, *per se*, more than in a sale, yet, as in sales, if

the wager partakes of illegality on the ground of good morals or public policy, then it is void. Insurance contracts, for example, are held, generally, not to be contracts of indemnity, but aleatory contracts (*Conn. Mut. Ins. Co. v. Schaefer*, 94 U. S. 462), yet no one thinks them illegal on that account. Some of our states, however, without a statute, have declared all wagers (excepting those of insurance) illegal, and in a large number of states statutes have been passed prohibiting wagers and gambling contracts.

In connection with this branch of the subject we find those cases popularly described as "stock gambling" or "speculations in futures," being contracts in connection with the future prices of stocks or merchandise. If, in such cases, the evidence shows that there was no intention of an actual sale on either side, or on the side of the party against whom the alleged illegality is made, then, by virtue of a statute covering the subject, or by force of the judicial decisions of the particular state, such contracts are illegal. Here, as in all alleged illegal contracts, the burden of proving the illegality is on the one alleging it, and it has been held that money deposited with a broker as margins in fictitious sales and purchases of stock may be recovered on the ground of an illegal contract.

Pratt v. Boody (N. J. Eq.), 35 Atl. R. 1113.

Dauler v. Campbell (Pa.), 35 Atl. R. 857.

Guyman v. Burlingame, 36 Ill. 201.

Story v. Solomon, 71 N. Y. 420.

§ 126. *Sales Illegal by Statutes:*

In addition to certain classes of sales which are illegal at common law, the various statutes of the several states specify other things which in the particular jurisdiction cannot be the subject-matter of a legal sale. These

statutes are too varied, and the subjects covered are too many, to set forth here. In general, they include intoxicating liquors, drugs or instruments to prevent conception (waiving here the question whether or not such latter sales are illegal at common law¹), certain officially unmeasured or unweighed articles (such as lumber, coal, grain, etc.), sales by unlicensed peddlers, and sales of certain uninspected goods. The statutes vary considerably, also, in their language, and therefore in most cases it is necessary to compare the decisions with the exact terms of the statutes. A survey of these statutes shows three general classes, as follows:

1. Statutes declaring certain sales null and void.
2. Statutes prohibiting and punishing such sales.
3. Statutes which merely punish such sales.

§ 127. Regardless, however, of the form of the statute, as given above, the weight of authority holds all such sales illegal, whether specifically declared void or not. In the case of unlicensed peddlers, however, and in certain other sales where a license is required *for purposes of revenue only*, no question arising as to the morality or immorality of the sale, the *sale itself* is, as a rule, valid.

Funk v. Gallivan, 49 Conn. 124.
Wheeler v. Russell, 17 Mass. 258.
Bancroft v. Dumas, 21 Vt. 456.
Barton v. Ice Co., 17 Barb. 404.
Banks v. McCosker, 82 Md. 518.
Aiken v. Blaisdell, 41 Vt. 655.
Harris v. Runnels, 12 How. 79.
Brewing Ass'n v. Nipp, 6 Kan. App. 730.

§ 128. As to intoxicating liquors furnished by clubs, in exchange for checks, etc., some states hold such ex-

¹ In Com. v. Leigh, 15 Phila. 376, it is said that this is not a *crime* at common law. Mr. Wharton doubts this. 1 Crim. Law, § 592.

changes to be sales under the statute, while others take the contrary view:

(1) Holding that they are sales.

State v. Mercer, 32 Iowa, 405.

Rickart v. People, 79 Ill. 85.

State v. Horacek, 41 Kan. 87.

(2) *Contra.*

Com. v. Smith, 102 Mass. 144.

People v. Adelphi Club, 145 N. Y. 5.

State v. St. Louis Club, 125 Mo. 308.

In connection with statutory or constitutional illegality of liquor sales, the famous "original package" case may profitably be read, although the question is, strictly, one of interstate commerce, rather than of sale.

Leisy v. Hardin (1890), 135 U. S. 100, 10 Sup. Ct. R. 725.

§ 129. Pensions; Federal Statutes:

The statutes of the United States (Rev. St., § 4766, with amendments of 1898 and 1899) provide that except in certain specified cases of lunatics under guardianship, desertion of family, etc., pensions are payable only to the party entitled thereto, and that they shall be paid out to no other person upon any order, warrant, power of attorney, etc.

As to goods sold to Indians, in violation of federal statutes, see

Dunn v. Carter, 30 Kan. 294.

§ 130. Sunday Sales:

Questions connected with sales made upon Sunday fall, properly, under sales made illegal by statute, since such sales are not void at the common law. If such sales are executed, the law, as in all other illegal sales, leaves the parties where it finds them. The vendor cannot enforce payment, the vendee cannot compel delivery. More-

over, if the sale is executory, neither party can enforce its performance, if the action is based upon the *Sunday* contract. Sales, frequently, however, are agreed to upon a Sunday, and delivery of the goods is made upon a subsequent legal day. In such cases it has been held a valid sale, depending, however, upon the assumption that the contract was formed at the time of delivery. The decisions must be interpreted, however, in the light of the language of the statute, since the alleged principles connected with such sales are, by no means, harmonious.

Johnson v. Brown, 13 Kan. 529.

Chestnut v. Harbaugh, 78 Pa. St. 473.

Adams v. Gay, 19 Vt. 358.

Harrison v. Colton, 31 Iowa, 16.

Foreman v. Abl, 55 Pa. St. 325.

Robeson v. French, 12 Met. 24.

§ 131. *Principles Applicable to Illegal Sales:*

Finally, in addition to what has been said, a few general principles pertaining to all illegal sales may here be briefly summarized. In general, a sale that is illegal in part is illegal *in toto*, although if the illegal portion is separate and distinct from the rest of the contract, the legal part may stand. If a sale is legal in the place where the contract was formed, then, in general, it is legal everywhere, the *lex loci contractus* applying rather than the *lex fori*. In certain C. O. D. cases, however, we have seen that the courts are not agreed as to the place of the sale. As to the burden of proof, it rests upon the party alleging the illegality.

Saratoga Bank v. King, 44 N. Y. 87.

Widoe v. Webb, 20 Ohio St. 431.

O'Rourke v. O'Rourke, 43 Mich. 58.

Swann v. Swann, 21 Fed. R. 299.

Perlman v. Sartorius, 162 Pa. St. 320.

Wilson v. Melvin, 13 Gray, 73.

Leisy v. Hardin, 135 U. S. 100.

PART IV.

PERFORMANCE OF THE CONTRACT.

§ 132. The discussion of the performance of the contract might very properly be taken up as a second division of our subject rather than as the fourth; that is, immediately after the consideration of the formation of the contract. Granting that the contract has been duly entered into, in carrying out, thereupon, the terms of the same, various questions arise in its performance. These questions are those of *conditions* connected with the contract, of various *warranties* concerning the goods, of *delivery*, and of *acceptance* of the same, and, finally, of *payment* for them. Each of these topics requires particular attention.

1. CONDITIONS.

§ 133. *Conditions and Warranties:*

Most of the text-writers upon the subject of sales recognize and appreciate the difficulties that are caused by the confusion of these terms, both in the books and in the various reports. In England, the term "condition" is frequently used when most American lawyers would employ the phrase "implied warranty." Due to this influence of the English writers and reports, the expressions have been interchangeably used by not a few of our own courts, and, in consequence thereof, but little dependence can be placed upon some of the decisions relating to "conditions" and "warranties" as reliable rules to assist us in our discriminations between these terms.

If the reader of the cases keeps this fact of the confusion of the words in mind, much of the apparent contradiction in the reports will be explained.

In the second division of our subject, "EFFECTS OF THE CONTRACT," we saw how title is affected by "conditional sales," how that such sales are executory, and that if there be a condition precedent or concurrent, then no title passes till such condition has been performed. We also noted that whether or not there is a condition is a matter of *evidence*, and this fact further explains why "conditions," as such, have often been confused with "warranties," since from the *evidence* it is frequently difficult to determine whether the question involved was, as a matter of fact, one of condition or one of (implied) warranty.

§ 134. *Definitions:*

There is, however, an important difference between a condition and a warranty. A condition is some stipulation, agreement, statement or promise which is *an essential part* of the contract, and which, therefore, affects its binding force. A condition is a vital part of the contract, and a breach in the condition invalidates or vitiates the contract.

§ 135. A warranty, on the other hand, is a more or less qualified promise or contract of *indemnity*. It is *subsidiary* or *collateral* to the main contract, and a breach of the warranty does not of itself vitiate the main contract, but gives rise to an action for damages.

NOTE.—Although there is a general right to return the goods in case of breach of implied warranty, and even in case of breach of express warranty in some states, nevertheless this is an optional remedy, and the breach of warranty does not necessarily vitiate the contract. It renders it liable to be avoided in such cases, but does not, *per se*, make it void.

§ 136. Keeping, therefore, in mind that in distinguishing between conditions and warranties the all-important question is one of *fact*, that is, did the parties, by their words, actions, or by the circumstances of the particular case, *intend* a condition, or did they *intend* a warranty, we may arrive at certain definite principles. It matters not what the *terms* or the *words* were, since there is no magic in the *word* "warrant" or the *word* "condition," the all-important question being, Does the *whole* evidence, considering all the circumstances, show that the contract was one that merely gave the right of a suit for damages in compensation for the loss (*i. e.*, a warranty), or was the stipulation such that its breach made the contract null *in toto* (*i. e.*, a condition)?

§ 137. *Sales to Arrive:*

Frequently sales are made of goods at sea or in transit across the land, as of a cargo, or of a carload, which are commonly called sales "to arrive," or "on arrival." Such sales are, of course, conditional, and therefore executory. No title passes until the goods have actually arrived, and the other conditions, if any, also performed. While this is the rule in absence of further evidence, yet, of course, the parties may by agreement stipulate that the title shall pass at once, or the vendor may warrant the arrival of the goods.

Benedict v. Field, 16 N. Y. 595.

Russell v. Nicoll, 3 Wend, 112.

Lanfear v. Sumner, 17 Mass. 110.

Rogers v. Woodruff, 23 Ohio St. 632.

§ 138. *Sales on Trial:*

"Sales on trial" are further examples of "conditions." Strictly speaking, such "sales" are, of course, not sales at all, but mere contracts to deliver to the prospective vendee the goods in question with the stipula-

tion that, if the goods upon trial conform to the terms of the contract, then a sale shall take place. Such contracts are executory, and no title, therefore, passes upon the delivery. In absence of any stipulation concerning the duration of the period of trial, a reasonable time is to be understood, and the failure of the vendee to return the goods, or to give notice of his decision within such reasonable time, will, in general, imply an agreement on his part to buy them, and in such cases the title passes. If specific agreements are entered into with respect to notice of dissatisfaction, etc., then the purchaser must comply with such terms.

Mowbray v. Cady, 40 Iowa, 604.
Hunt v. Wyman, 100 Mass. 198.
Furneaux v. Esterly, 36 Kan. 539.
Machine Co. v. Mann, 42 Kan. 372.
Keeler v. Jacobs, 87 Wis. 545.

§ 139. Sale or Return:

Quite different from "a sale on trial" is the effect of a contract designated as "a sale or return." In the latter case there is a completed sale, a passing of the title, with a promise on the vendor's part to buy back the goods at the option of the vendee. This promise to take back the goods is a part of the entire contract, and, consequently, need not be in writing, to satisfy the Statute of Frauds, if the main part of the contract was taken out of the statute by delivery, part payment, or otherwise.

Johnston v. Trask, 116 N. Y. 136.
McKinney v. Bradlee, 117 Mass. 321.
Southwick v. Smith, 29 Mo. 228.
Hotchkiss v. Higgins, 52 Conn. 205.
Cookingham v. Dusa, 41 Kan. 229.
Carter v. Wallace, 32 Hun, 384.
Moline Plow Co. v. Rodgers, 53 Kan. 743.

§ 140. *Goods to be Satisfactory:*

It happens not infrequently that certain sales are made with the agreement that the goods shall be "satisfactory" to the vendee. This occurs, generally, when the goods are to be made to order, or to be previously obtained by the vendor. Upon the delivery of the goods, the question then is simply one of acceptance by the vendee, the condition being that, if the vendee does not accept, no sale takes place. Since the acceptance is to depend entirely upon the personal "satisfaction" of the vendee, he is the sole judge, and the question generally is not whether the vendee *ought* to be satisfied, but *is* he satisfied. Consequently, in such cases, if the vendee refuses to accept, although his refusal be apparently unreasonable, nevertheless, there is no sale.

§ 141. *That the goods shall be satisfactory* may take the form of either a condition or a warranty, and may be contained as a stipulation in a "sale on trial," or in a "sale and return." In such cases the continued use of the goods by the vendee, after their receipt, or his failure to return them or to give notice of dissatisfaction within a reasonable time, may be taken to legally imply his satisfaction. Where the agreement that the goods shall be satisfactory enters into a contract of "sale and return," the vendee is supposed to have opportunity to try the goods before the title (and, consequently, the risk) passes. Thus, where a horse was delivered to the vendee in a so-called "sale and return," with an agreement that the vendee should try him for a week and if unsatisfactory return him, but the horse died on the third day after the delivery, it was held that no title passed. But this contract was, properly, a sale on trial.

Brown v. Foster, 113 Mass. 136. (A suit of clothes.)
Campbell Press Co. v. Thorp, 36 Fed. R. 414.

Zaleski v. Clark, 44 Conn. 218.

Wood Reaping Machine Co. v. Smith, 50 Mich. 565.

Duplex Safety Co. v. Garden, 101 N. Y. 387.

Singerly v. Thayer, 108 Pa. St. 291.

§ 142. Some of the cases, however, do not go as far as the general rule, it being *held* that there must be *good faith* on the part of the vendee, and that his dissatisfaction must be an *actual* one, and not a mere arbitrary, unreasonable refusal to accept. The vendee is under legal obligation to give the article a fair trial, in certain cases.

McClure v. Briggs, 58 Vt. 82.

School Furniture Co. v. Warsaw, 130 Pa. St. 76.

Doll v. Noble, 116 N. Y. 230.

§ 143. The expression "satisfactory" may be modified or explained by the context, and in such cases, if the article comes up to the standard agreed upon, the vendee cannot arbitrarily reject. If a third person is to decide upon the satisfactory character of the goods, his decision must be rendered in the utmost good faith to both parties.

Clark v. Rice, 46 Mich. 308.

D. M. Ferry & Co. v. Ballinger (Kan.), 60 Pac. R. 824.

County of Cook v. Harms, 108 Ill. 151.

§ 144. *Conditions of Instalment Deliveries and Payments.*

Many contracts to sell goods are accompanied with conditions that the goods shall be delivered in instalments from time to time. This occurs often in building, or in wholesale, transactions, where materials are to be furnished at certain dates, or merchandise is to be delivered at agreed upon days. Time, in such cases, is often very important, since loss may follow from delays in receiving material, or prices may be greatly changed by market conditions. The prevailing rule is, that a failure

by the vendor to deliver the first or a subsequent instalment of such goods releases the vendee from the contract.

Norrington v. Wright, 115 U. S. 188 (a leading case).

Cleveland Rolling Mill v. Rhodes, 121 U. S. 255.

Pope v. Porter, 102 N. Y. 366.

Bradley v. King, 44 Ill. 389.

Catlin v. Tobias, 26 N. Y. 217.

§ 145. A contrary view is taken by some authorities, they holding that the stipulations as to delivery are not conditions, a breach of which vitiates the whole contract, but mere collateral agreements, or warranties as to delivery, and, therefore, in accord with this theory a breach gives an action for damages for the loss or delay occasioned, but does not justify one in rescinding the contract.

Gerli v. Poidebard Silk Co., 57 N. J. L. 422, 31 Atl. R. 401.

Lucesco Oil Co. v. Brewer, 66 Pa. St. 351.

Hansen v. Consumers' Steam Heating Co., 73 Iowa, 77, 34 N. W. R. 495.

Bollman v. Burt, 61 Md. 415.

§ 146. If the contract for the sale of goods to be thus successively delivered is an *entire* one, and the several deliveries are not separable contracts, then if after the first delivery there are failures in subsequent deliveries, the vendee may rescind the contract, return the goods already delivered, and is relieved from the obligation of any payment. Goods, however, used or consumed by the vendee may be, in general, sued for by the vendor under a *quantum valebant*.

Klein v. Tupper, 52 N. Y. 550.

Haines v. Tucker, 50 N. H. 307.

Verkamp v. Hubbard Co., 58 Cal. 229, 41 Am. R. 265.

§ 147. Concerning failures to pay, upon successive deliveries, if so stipulated, the character of the failure influences the rule. A mere failure in payment, accompanied by no evidence of intention on the vendee's part to rescind the contract, should not relieve the vendor from the duty of

subsequent deliveries. An inexcusable refusal, however, to pay, or evidence that shows that the vendee does not intend to live up to his agreement, or conditions of insolvency that show the inability of the vendee to pay, should justify the vendor in refusing further deliveries.

Winchester v. Newton, 2 Allen, 492.

West Republic Mining Co. v. Jones, 108 Pa. St. 55.

Gill v. Benjamin, 64 Wis. 362.

Bradley v. King, 44 Ill. 339.

Florence Mining Co. v. Brown, 124 U. S. 385.

§ 148. *Defenses to Non-compliance with Conditions:*

The question of instalment payments in connection with instalment deliveries is an illustration of what are known as *mutual* or concurrent conditions, and, in general, it is the law that where mutual or concurrent conditions exist, one party cannot enforce his demands without, in turn, having complied with, or being in readiness to comply with, the duty incumbent upon him. The vendor cannot recover the price unless he has delivered, or stands ready to deliver, the goods. Consequently where one of the parties refuses to comply with the conditions imposed upon him, or where one party obstructs performance by the other, or prevents the other from carrying out the contract, then the innocent party is released.

§ 149. Concerning illegal contracts, they have been considered in a preceding section. The same rules, however, as to the effect of illegality upon the entire contract apply to conditions connected with contracts. That is, if a condition is illegal, and, therefore, *legally* impossible, it is invalid and cannot be required. Moreover, conditions that are physically impossible of performance, such, for example, as are caused by the loss or destruction of the particular subject-matter of the sale (as the death of a horse), or conditions that, impliedly, depend upon one's personal skill or attention, but are prevented by the sick-

ness of the party, are excusable, and the contracting party is released from them. It should be noted here, however, that there is an implied understanding (or an implied condition) that the promisor should be released in case of such events. Between conditions, however, that are strictly *impossible*, and those that the promisor has not performed on account of some hardship or misfortune, careful discrimination must be made. Disability is not inability. The latter is the same thing as impossibility, and denotes an inherent quality. The former state implies that the thing itself is possible, but that the promisor is prevented by some cause from carrying it out. He might have guarded against being held by making proper stipulations to that effect, but, if his contract is absolute, and there are no exemptions, either express or implied, his inability is no defense, although he may be prevented by the direst accident, the elements, or other cause.

(1) Mutual or concurrent conditions.

Smith v. Lewis, 26 Conn. 110.

Robison v. Tyson, 46 Pa. St. 286.

(2) Refusal or obstruction by one party.

Follansbee v. Adams, 86 Ill. 13.

Nichols v. Scranton Steel Co., 137 N. Y. 471.

Stanford v. McGill (N. Dak.), 72 N. W. R. 938, 38 L. R. A. 760, and note.

Bolton v. Riddle, 35 Mich. 13.

United States v. Peck, 102 U. S. 64.

Hartlove v. Durham (Md.), 39 Atl. R. 617.

(3) Impossibility and disability.

Jones v. United States, 96 U. S. 24. (Contractor's mill was burned, and he was thus unable to deliver goods. *Held*, no excuse.)

Dexter v. Norton, 47 N. Y. 62.

Eddy v. Clement, 38 Vt. 486.

Anderson v. May, 50 Minn. 280.

Dickinson v. Calahan, 19 Pa. St. 227.

§ 150. *Kinds of Conditions:*

In connection with sales of *real* property, conditions are said to be precedent, concurrent or mutual, and subsequent, the latter being conditions the non-performance of which *after* the passing of the title will defeat the already vested estate. After the analogy of such a classification of conditions as known to the law of real property, some writers and courts speak of "conditions subsequent" in connection with contracts of sale of personal property, thus causing not a little confusion and perplexity, since the fundamental idea of a "condition" in sales of personal property is that a failure to comply with its terms goes to the very essence of the contract and prevents the title from passing. In this application of the term, all conditions are *precedent*, since concurrent or mutual conditions are, after all, only reciprocal conditions precedent. It is said, however, that conditions may be subsequent, even in sales of personal property. It seems to the writer that the use of the latter term is unfortunate, and that there is no necessity for its employment in sales of personality. It is said that "a sale or return" is illustrative of a condition subsequent, since there is an agreement between the parties that, upon the election of the vendee, the chattel may be returned, although the title by the original contract has passed. Is this, however, properly speaking, a *condition subsequent*? Suppose I buy your horse under a contract of sale or return. Within the time agreed (or a reasonable time) I offer to return the horse, but you, now, refuse to accept him. I have my action against you for breach of contract, but the *title* to the horse is, still, in me. In *Stevens v. Cunningham* (3 Allen, 491), it was held that where a vendor refused to take back an engine he had sold, but afterwards agreed to rent it from the vendee, and, upon thus obtain-

ing repossession, mortgaged the engine, the *title* to it was in the original vendee, and that the mortgagee acquired no title.

I "sell" you my horse, but if you do not pay me by four o'clock to-morrow, say, I shall take him from you. Is this a condition *subsequent*? Is it not rather a contract that the *risk* shall be upon you, meanwhile, but that no title passes till you pay me, that is, a condition *precedent*? Again, it is said that a sale with a privilege of redemption, the *vente a reméré* of the civil law, is "a perfect illustration of the condition subsequent." Thus I, in order to raise money, "sell" you my horse to-day for \$50, with the stipulation that I may buy him back in thirty days for \$55 if I choose. Such transactions as these, however, are not *sales*, but, despite the fact that the form of the contract is an absolute sale, are held, in equity, to be *mortgages*, the evident intention of the owner of the horse being the obtaining of a loan. In illustration of such cases, the reader is referred to the citations in § 2, g. On the other hand, it is true, of course, that there may be a conditional *sale*, the condition being that the vendor may repurchase. Here, as in the other cases of genuine conditional sales, the question is whether or not such a condition is, really, a precedent one, rather than a subsequent one. It is not necessary, however, nor perhaps important, to dwell upon this. The simple question is, Does the doctrine of conditions subsequent, familiar in sales of realty, have any place in sales of personal property?

Knox v. Perkins, 15 Gray, 529.

Lilienthal v. Suffolk Brewing Co., 154 Mass. 185, 26 Am. St. R. 234.

Chamberlain v. Dickey, 31 Wis. 68.

Carpenter v. Scott, 13 R. I. 477.

Eckert v. McBee, 27 Kan. 232.

2. WARRANTIES.

§ 151. Passing now from "conditions" to "warranties," it will be helpful to give once more a definition of a warranty.

A warranty (or guaranty) is an assurance of protection against harm or loss — a qualified contract of indemnity. It is a statement or representation of some fact, and arises either from express agreement or from implication of words, circumstances, or actions. When made at the time of a sale it is subsidiary and collateral to it; but it may be made subsequently to, and entirely independently of, the sale, for it is not an essential part of a sale, although often connected with or appended to one.

This definition of a warranty is somewhat longer than the one previously given, but better suited to our present discussion. The important doctrine to be kept in mind is that a warranty is a representation of some fact, accompanied by a promise to indemnify the vendee, should the result not be as assured. Since a representation may be made with knowledge of its falsity, a warranty made under such circumstances constitutes fraud, and, if made at the time of the sale and relied upon by the vendee, the effect upon the contract of sale would be the same as caused by any other form of fraud.

A warranty being a contract, it must, in order to be suable, be founded upon some consideration; and if made in connection with the sale, the consideration for the sale is sufficient to support it. A warranty made after a sale, however, must have an additional consideration, or else it is void.

Crossman v. Johnson (Vt.), 13 L. R. A. 678, and see note there;
s. c., 63 Vt. 333.

Lunt v. Wrenn, 113 Ill. 175.

Warren v. Coal Co., 83 Pa. St. 440.

Vincent v. Leland, 100 Mass. 432.

Summers v. Vaughn, 35 Ind. 323.

Shippen v. Bowen, 122 U. S. 575.
Daniells v. Aldrich, 42 Mich. 58.
White v. Ewing, 69 Fed. Rep. 451.
Bondurant v. Crawford, 22 Iowa, 40.

§ 152. *General Principles:*

Warranties are either express or implied, the former arising from some actual representation or assurance of the seller in connection with the goods sold, the latter being created by law, and inferred from all the circumstances of the sale.

Express warranties require no particular form of words, and technical words, as "warrant," "guarantee," etc., are never necessary. The question is, What did the parties do or say? Some authorities hold that there can be no warranty unless the seller *intended* to warrant, but the true principle is that if the buyer had reasonable ground to rely upon the material statements of the seller, then such statements are warranties. Mere opinion, or dealer's talk, or praise of one's goods, is not a warranty, but the assertion or representation of some material fact, relied upon by the vendee, is. It is for the court to interpret a warranty, there being no question for the jury when the facts are undisputed. When, however, there is dispute or doubt as to what was said or done, it becomes a question of fact for the jury; and the facts being found, it is for the court to construe the meaning of those facts. This, of course, refers only to oral warranties, for when the warranty is in writing, then its construction is alone for the court. Warranties, however, need not be in writing, unless, if made at the time of the sale, and as a part of it, the contract of sale (for example, a formal bill of sale) is in writing, or unless they are to run for a period prescribed by the jurisdiction's statute of frauds, which is, generally, for a period beyond one year.

Kingsley v. Johnson, 49 Conn. 462.
Short v. Woodward, 13 Gray, 86.

Torkelson v. Gorgenson, 28 Minn. 383, 10 N. W. R. 416.

Wason v. Rowe, 16 Vt. 525.

Ender v. Scott, 11 Ill. 35.

Holmes v. Tyson, 147 Pa. St. 305.

Hawkins v. Pemberton, 51 N. Y. 198.

§ 153. *In Writing:*

If, however, as stated in the previous section, the *contract* is in writing, then the warranty, if any, must be made a part of it, in order to base any action upon it. This requirement comes under the rule of evidence that a written instrument cannot be varied or altered by parol testimony. A warranty made *subsequently*, however, to the written contract, and supported by an independent consideration, need not be in writing, unless, as said before, it is to remain in force beyond a certain time.

McCormick Machine Co. v. Thompson, 46 Minn. 15.

Mullain v. Thomas, 43 Conn. 252.

Windmill Co. v. Piercy, 41 Kan. 763; 48 id. 263; 55 id. 104. But the rule does not apply to a mere memorandum of sale, or a mere receipt for price. Wood Machine Co. v. Gaertner, 55 Mich. 453.

§ 154. *Patent Defects:*

It is said by some text writers and by some courts that an express warranty may cover patent defects. In one case¹ the trial court erroneously said, "you sell me a horse, and you warrant him to have four legs, and he has only three. I will take your word for it." The point in all such cases is the word "patent" or "obvious." Patent to whom? There is no doubt that defects may be patent to the seller yet unseen to the buyer, and in such cases, or where the buyer has had no opportunity to examine the goods, or where the buyer, even if he sees the goods, may have no knowledge of the significance of certain indications which to an experienced person would be evidence or proof of defects, an express warranty may cover such

¹ McCormick v. Kelly, 28 Minn. 135.

defects. Where, however, the defects are clearly obvious to, and their nature understood by, the purchaser, it is neither law nor sense (and the two are synonymous) to say that one relies upon a statement which he knows to be false.

McCormick v. Kelly, 28 Minn. 135.
Pinney v. Andrus, 41 Vt. 631.
Watson v. Roode, 30 Neb. 264, 46 N. W. R. 491.
Kenner v. Harding, 85 Ill. 264.
Bennett v. Buchan, 76 N. Y. 386.
Storrs v. Emerson, 72 Iowa, 390.
Chadsey v. Greene, 24 Conn. 562.

§ 155. *Soundness in Animals:*

The question of warranty occurs very frequently in the sale of domestic animals, especially horses, cows, sheep, etc. There are no special rules applicable to such cases as distinct from other articles of sale. The question is one of fact in each case, and of interpretation of the words used. A temporary disease or injury may or may not be unsoundness according to the circumstances, and according to the use intended.

Joy v. Bitzer, 77 Iowa, 73, 3 L. R. A. 184, and note there reviewing the cases.
Hobart v. Young, 63 Vt. 366, 12 L. R. A. 693.
Schee v. Shore, 6 Kan. App. 187, a warranty that a horse was "as sound as a dollar." Held, that seller was liable for actual damages, since the horse was diseased at the time, and afterwards had to be killed.
Roberts v. Jenkins, 21 N. H. 116.
Washburn v. Cuddihy, 8 Gray, 430.

§ 156. *Warranties in Futuro:*

Blackstone says (3 Com. 166) that warranties cannot reach to things not now in existence, but which may possibly occur *in futuro*, but Mr. Benjamin (Benjamin on Sales, § 623) shows that the law is different now even in England, and, in this country, the rule is clear that if the

warranty expressly covers events to happen in the future such a warranty is valid.

Osborn v. Nicholson, 13 Wall. 654.

Snow v. Schomacker Mfg. Co., 69 Ala. 111.

Fitzgerald v. Evans, 49 Minn. 541.

Leitch v. Gillette Co. (Minn.), 67 N. W. R. 352.

Leggat v. Sand's Ale Co., 60 Ill. 158.

§ 157. *Warranties by Auctioneers, etc.:*

Although this question belongs to the subject of agency, a brief reference to it is important here, since so many sales are negotiated by various kinds of agents. The fundamental rule is that an agent merely empowered to sell has no authority to warrant, unless such authority is implied by custom. Kent says (2 Com. 621) that an agent authorized merely to sell *can* warrant providing such warranty is reasonably within the scope of his duties; but perhaps this statement is not in conflict with the preceding. In a recent case¹ (1896) it was *held* that warranties made by an auctioneer at a *public* auction were valid.

Cooley v. Perrine, 41 N. J. L. 322.

Upton v. Suffolk Co. Mills, 11 Cush. 586.

§ 158. *Implied Warranties:*

Implied warranties, or such as are imputed by law, are, in general, warranties of the seller's title; of the identity of the kind or species of the goods bought; of the correspondence of goods to the sample, *when actually sold by sample*; of the fair merchantability of the goods when sold "by description;" and of their fair fitness for the particular purpose for which bought, when the buyer relies upon the seller's judgment.

¹ Ingraham v. Union R. Co. (R. I.), 33 Atl. R. 875. See, however, The Monte Allegre, 9 Wheat. 647.

§ 159. *Implied Warranty of Title:*

As we noted in an earlier section, implied warranties are often, especially in England, designated as "conditions," and this is particularly true in case of implied warranty of title. Some of our American text-writers, likewise, speak of it as a condition, since it is an essential part of a sale that there should be a legal title to be transferred, because, otherwise, there can be no sale. On the other hand, there are other writers who say that there is no such thing as an *implied* warranty of title, since only by *express* warranty is title guaranteed, and that in the sales of personal property as in realty, the doctrine of *caveat emptor* applies to *title*, unless there be express assurance. Dismissing this theory, which undoubtedly was the old English doctrine (since the English rule as to sales in market overt did not make it important), we may say, in brief, that there is now, both in England and America, a generally recognized rule that when the vendor is in possession of the goods, then, upon his offering them for sale, there is an implied warranty that his title is valid, and that he transfers such valid title to the vendee. The growing tendency is to apply this same rule also to goods not in the vendor's possession, although some jurisdictions hold that in the latter case the doctrine of implied warranty of title does not apply, but that the vendee takes at his risk. It is, however, in principle, a matter of evidence. If the non-possession were the only thing to be considered, the vendor might well be on his guard; but when the circumstances connected with the sale are such, even in absence of assertion of ownership by the vendor, that the vendee has reasonable cause to believe that the vendor is dealing with the goods as his own, then the implied warranty of title should apply.

Shattuck v. Green, 104 Mass. 42.

Starr v. Anderson, 19 Conn. 341.

Paulsen v. Hall, 39 Kan. 365.

§ 160. As to no implied warranty when the seller is not in possession, see

Gould v. Bourgeois, 51 N. J. L. 373.

Huntingdon v. Hall, 36 Me. 501.

Scranton v. Clark, 39 N. Y. 220.

In *official sales*, however, such as sales by sheriffs, mortgagees, etc., the vendee merely buys the title or interest of the person represented — there is no implied warranty.

The Monte Allegre, 9 Wheat. 616.

Baker v. Arnot, 67 N. Y. 448.

Bingham v. Maxcy, 15 Ill. 295.

§ 161. *Identity of the Kind or Species Bought:*

When goods are bought by some descriptive or trade name, it being understood that they are not inspected and selected by the buyer, there is an implied warranty that the goods will correspond, not in *quality*, but in *identity of kind*, to the name under which they were sold. If one buys steel, for example, the contract is not performed by the delivery of iron. If my order is for wheat, it is not filled by a delivery of corn. "Paris green" is not the same thing, in *kind*, as "chrome green;" an order for "early strap-leaf red-top turnip seed" is not satisfied by "Russia turnip seed," etc. Although the sale may be one "with all faults," this merely means such faults as an article of the identity ordered may have. If I buy a note, I mean a genuine note, not a forged one. In all such cases, while there is no implied warranty as to the *quality*, whether good or poor, there is an implied warranty that the goods will conform to the *kind* or *species* ordered. There is reason, in such cases, in calling such implied warranties "conditions," since, in reality, they go to the very essence of the contract, and in such cases the vendee is not bound to accept, and may sue for the purchase price if paid, but, as has been said before, the right to return is

only a cumulative remedy in such cases, and the buyer may accept and sue upon the implied warranty.

Wolcott v. Mount, 36 N. J. L. 266.
Meader v. Cornell, 58 N. J. L. 375, 33 Atl. R. 960.
White v. Oakes, 88 Me. 368, 34 Atl. R. 175.
Dounce v. Dow, 64 N. Y. 411.
Webster Marble Co. v. Dryden, 90 Iowa, 37.
Whitney v. Boardman, 118 Mass. 242.
Terry v. Bissell, 26 Conn. 23.
Columbian Iron Works v. Douglas (Md.), 34 Atl. R. 1118.

§ 162. *Doctrine of Caveat Emptor as to Quality:*

The doctrine of *caveat emptor* (let the buyer take care) is said, in general, to apply to questions of title and of quality. We have noted how this is true, as to title, in cases of sales of realty, in official sales of personality, and, in some states, when in ordinary sales of personality the goods are not in the possession of the vendor. It is with respect to quality, however, that we wish to emphasize the doctrine here. Where the vendee has opportunity to inspect the goods, or orders specific goods of his own selection, there is no implied warranty as to the quality of the same. This is a rule almost universally applied. It is for the purchaser to take note of the qualities of goods reasonably under his observation and judgment, and unless the seller gives an express warranty, or unless the seller be guilty of fraud, the purchaser buys, generally, at his own risk. If, of course, the article be sold by description, and if the quality be clearly made a part of the description, then the rule of implied warranty of species or kind applies.

In the civil law the doctrine of *caveat venditor* (let the seller take care) more equitably applies. This is the doctrine that "a sound price implies sound goods." (Pothier, Cont. de Vente, No. 184.) The state of South Carolina

applies this doctrine (*Bulwinkle v. Cramer*, 27 S. C. 376), but this is exceptional.

Gould v. Bourgeois, 51 N. J. L. 361.

Lukens v. Freiund, 27 Kan. 664 (cited in 55 Kan. 107).

Dean v. Morey, 33 Iowa, 120.

Day v. Pool, 52 N. Y. 416, 53 id. 515.

Drew v. Roe, 41 Conn. 50.

Hadley v. Clinton Co., 13 Ohio St. 502.

§ 163. *Implied Warranty in Sales by Sample:*

When goods are actually sold by sample (this, of course, being a question of fact or evidence), then, in general, there is an implied warranty that the goods shall be equal in quality to the sample. This doctrine, however, is denied in Pennsylvania, where it is said that there is, in such cases, no implied warranty of *quality*, but only implied warranties of *kind* or *species*, and of merchantability.

Merriman v. Chapman, 32 Conn. 146.

Webster v. Granger, 78 Ill. 230.

Schnitzer v. Oriental Print Works, 114 Mass. 123.

Osborne v. Gantz, 60 N. Y. 540.

Field v. Kinnear, 4 Kan. 476 (cited in 27 id. 666).

Boyd v. Wilson, 83 Pa. St. 319, 26 Am. R. 176.

§ 164. *Merchantableness, Fitness for Specific Purpose:*

When the goods are sold by description, or where the buyer relies upon the seller's selection and judgment (but not where the buyer selects the goods himself), there is an implied warranty that the goods are fairly fit for market, *i. e.*, merchantable, or, if ordered from a manufacturer for some particular use, as communicated to him, that the goods are fairly fit for the particular purpose for which bought. In cases of dealers, not manufacturers, there is a conflict of opinion, some authorities holding dealers equally bound as to such implied warranties

as manufacturers. This warranty covers, of course, all latent or hidden defects which render the articles unfit for the specific use, although as to such defects a seller who is not the manufacturer should not, in principle, be bound, and this is the general rule.

Murchie v. Cornell, 155 Mass. 60, 14 L. R. A. 492. See accompanying note.

Moore v. Union Stock Yards, 21 Oreg. 289, 14 L. R. A. 157.

Hoe v. Sanborn, 21 N. Y. 552, 149-id. 137.

Howard v. Hoey, 23 Wend. 350.

De Witt v. Berry, 134 U. S. 306.

Pacific Iron Works v. Newhall, 34 Conn. 67.

Bigger v. Bovard, 20 Kan. 294.

Lukens v. Freiund, 27 Kan. 664.

Hight v. Bacon, 126 Mass. 10.

Kohl v. Lindley, 39 Ill. 196.

Rodgers v. Niles, 11 Ohio St. 48.

As to others than manufacturers, see

White v. Oakes, 88 Me. 367, 34 Atl. R. 175.

McQuaid v. Ross, 85 Wis. 492, 22 L. R. A. 187. See note in L. R. A.
Gentilli v. Starace, 133 N. Y. 140.

Shaw v. Smith, 45 Kan. 334, 25 Pac. R. 886. (Dealers in flaxseed held liable in that flaxseed sold by them for sowing is impliedly capable of germinating, and therefore suitable for raising a crop of flax.)

Swain v. Schieffelin, 134 N. Y. 471.

Where, however, the article is according to the *order* of the buyer, or selected by him, there is no implied warranty of fitness.

Gregg v. Page Belting Co. (N. H., 1898), 46 Atl. R. 26.

Nashua Iron Co. v. Brush, 91 Fed. R. 213.

Deming v. Foster, 42 N. H. 165.

Morris v. Bradley Fertilizer Co., 64 Fed. R. 55.

And fitness for a particular use means a fair fitness; not that the article is necessarily the best article, or the most economic article for such intended purpose.

Seitz v. Brewers' Refrig. Co., 141 U. S. 510.

This same rule is also applicable in express warranty. In the case below it was *held* that a boiler warranted to give two hundred horse-power does not imply a boiler that will demonstrate the best economy in coal.

City Ry. Co. v. Basshor, 82 Md. 397, 33 Atl. R. 635.

Where, however, there was a warranty that the machine "would do as good work as any other," it was *held* in a recent Vermont case (1896) that this implied that the cost of operating should be no greater than other machines.

Vermont Farm Machine Co. v. Batchelder, 35 Atl. R. 378.

§ 165. Wholesomeness of Provisions:

Does the rule of fitness for a particular purpose include provisions purchased for the purpose of food? Does it mean that there is an implied warranty that the food is wholesome? Good authorities say yes, in answer to this question, and the older English and American cases support this view, and there is no good reason why the rule should not apply to provisions as well as to all other articles. The whole difficulty of this question is in the fact that an implied warranty of the wholesomeness of food, under any and all circumstances, has been confused with the question of implied warranty when the provisions have been sold by description or upon the reliance by the buyer upon the judgment and selection of the seller. This discrimination has often been lost sight of, and it is contended that, if this distinction be applied, then the true rule is that, in case the buyer does rely upon the selection of the seller, there is an implied warranty that the goods are fit for the particular use intended, namely, their use as food, and, therefore, wholesome. That, however, on the other hand, there is always an implied warranty that provisions inspected and selected by the buyer are wholesome, we believe to be untenable, although

some cases go to this length. It is said (Benjamin on Sales, Bennett's Notes, 7th ed., p. 691) that it is well settled that between *dealers*, however, the rule of implied warranty of wholesomeness does not apply. This may safely be doubted, since if one dealer trusts to the *selection* of the other dealer, the implied warranty of *merchantability* should apply, and it is a serious question if provisions are *merchantable* if they are not fit for food.

Care should be taken to distinguish cases arising on the question of the common-law implied warranty from those influenced by statutory provisions against selling unwholesome or adulterated food. Moreover, many of the cases of damages for injuries received from eating unwholesome food turn upon the question of negligence or of fraud, rather than of implied warranty.

Hoover v. Peters, 13 Mich. 51.

Reynolds v. Palmer, 21 Fed. R. 453.

Van Bracklin v. Fonda, 12 Johns. 468.

Giroux v. Stedman, 145 Mass. 439.

Wiedman v. Keller, 171 Ill. 93. (1898.)

Craft v. Webb, 96 Mich. 245, 21 L. R. A. 139, and note.

Howard v. Emerson, 110 Mass. 321.

Best v. Flint, 58 Vt. 543.

Lukens v. Freiund, 27 Kan. 664. (Holding that the rule does not apply, however, to food for cattle.)

French v. Vining, 102 Mass. 132.

Sheffer v. Willoughby, 163 Ill. 521. (A meal in a restaurant.)

§ 166. *Warranties Implied from "Usage."*

Questions are sometimes raised upon implied warranties from usage or custom. Since, however, the proper office of usage or custom in trade is to give meaning to the terms of a contract, the principles involved depend merely upon matter of evidence in each particular case, and no general rules can be helpfully laid down.

Wetherill v. Neilson, 20 Pa. St. 448.

Schnitzer v. Oriental Print Works, 114 Mass. 123.

3. DELIVERY.

§ 167. After the contract has been formed and the time for its performance has arrived, the buyer, upon payment, is entitled to the possession of the goods, and the seller is under obligation to deliver them. The terms "possession" and "delivery" are, unfortunately, used in so many different ways, and under so many dissimilar circumstances, that some care is required to properly distinguish their significance. Delivery of title (or transfer of title) is not, of course, the same thing as delivery of the goods. There may be a transfer, or passing, of title without any delivery of the goods, since, between the parties, delivery of the goods is not always essential to the passing of title. On the other hand, there may be a delivery of the goods without a transfer of title, as we have previously noted.

"Delivery" is often defined as a transfer of possession, but here, again, the word "possession" requires attention, since it, also, is used in several ways. There is physical possession, which may be either "custody" or "legal possession," and there is a "right of possession," all of which, under varying circumstances, are referred to as "possession." As to "delivery," we speak of "actual" delivery, "constructive" delivery, and "symbolic" delivery. Furthermore, additional confusion has been caused by speaking of the "kind" of delivery that is necessary in order to satisfy some one principle of the law, and the "kind" of delivery that is necessary to establish another principle; for example, it is said that "a higher kind of delivery" is required in order to pass title to the vendee against the vendor's creditors, than is required to merely pass the title to the vendee as against the vendor.

It is believed, however, that much of the alleged difficulty connected with the subject can be removed by keeping a few elementary principles clearly in mind. The

vendor's duty is to *deliver*. What does that mean? It means that it is his duty to permit the vendee to assume legal possession of the goods. No act of carriage is contemplated. The duty is not a *physical* one, but a *mental* one. It is the yielding up, voluntarily, on the vendor's part of his legal possession, and resigning the same to the vendee. If I sell you a book, and the contract is closed, it is my duty to *deliver*, but not my duty to pick up the book and hand it to you. Providing the book is where you can assume control of its legal possession, delivery is complete as soon as I agree to your possession. Unless I agree to carry the book to your home, place of business, or other designated place, you must come and get it yourself.

As to the kinds or degrees of delivery, it will be helpful to remember that, after all, it is only a matter of *evidence*, of *fact*, depending upon the principle involved. Delivery in one case is not a different "kind of delivery" than in another, but the kind of evidence required to show that there really *was* a delivery varies in accordance with the nature of the case. I sue you for "goods sold and delivered." It is sometimes said that this action requires a higher kind of delivery than is the delivery required in simply passing the title. The correct view is that it would require a higher degree of *evidence* to *establish* the delivery in one case than in the other. Again, it is said that the delivery necessary to pass title against the vendor's creditors is one of the "*highest kinds*" of delivery; but all that this means is, that, in order to protect creditors against alleged fraudulent sales, the fact of delivery must be clearly established, and that goods retained by the vendor will, in some cases, as we have seen, be taken as conclusive evidence of fraud. Even in the absence of alleged fraud, clear evidence of acts constituting actual delivery, or constructive delivery in cer-

tain cases, is necessary in order to defeat the creditor's claims, although, of course, if there be actual fraud an actual delivery will not prevail.

We may, then, dispense with much of the attempted classification of kinds of delivery, and, defining delivery to be the transfer by the seller of legal possession to the buyer, be guided by the facts of each particular case when the question of whether or not there was delivery is raised, remembering that more evidence is required when the rights of third persons are involved than when the question is between the contracting parties only. It will be prudent, however, to bear in mind that on account of the very great difficulty, at times, in determining (even when the facts are known) whether or not there was a delivery, much difference of opinion arises. In speaking only of delivery connected with the mere passing of title and with the requirements of the Statute of Frauds, Chancellor Kent says: "But even in this general view of the subject, it has been difficult to select those leading principles which were sufficient to carry us safely through the labyrinth of cases that overwhelm and oppress this branch of the law."¹

Nevertheless, there are some threads to guide us in this labyrinth, and we may escape some confusion by noting the following principles:

§ 168. 1st. Delivery is not essential to a sale. Title and risk may pass, without the vendee having, as yet, the right of possession. The vendor has, even after the passing of title, a lien upon the goods for the price, and only when the vendee has complied with precedent conditions (for example, payment) is he entitled to possession, and, thereupon, the vendor under obligation to deliver.

Dixon v. Yates, 5 B. & Ad. 313.

McNamara v. Edmister, 11 Hun, 597.

¹ Com., II, 510, ed. 1884.

§ 169. 2d. The expression "delivery sufficient to pass title" is misleading, since to pass the title the *intention* of the parties governs, and evidence of acts showing delivery is for the purpose of proving an intention to pass title rather than to prove delivery for its own sake.

§ 170. 3d. It is also confusing terms to say that "delivery that is effective for one purpose may be ineffectual for other purposes," since the principle is, that certain acts or circumstances that might sufficiently show the intention of the parties in one case would not, in a different case, be free from doubt. This is illustrated in actions for "goods sold and delivered" (one of the "counts" in general *assumpsit*), and in *delivery* that deprives a vendor of his lien for the price, and in *delivery* that defeats the rights of the vendor's attaching creditors.

§ 171. 4th. The rule in stoppage *in transitu*, that, in case of insolvency of the vendee, the vendor may stop the goods while in transit, that is, after they have been *delivered* to the common carrier, although "such a delivery" is "sufficient" to deprive the vendor of his lien, but not "such a delivery" as is required in order to defeat the right of stoppage, is not in conflict with the foregoing principles, since the right of stoppage *in transitu* is unknown to the common law, being a custom or usage of the law merchant, and governed by a special rule for the very purpose of providing for the peculiar relief intended.

ILLUSTRATIVE CASES ON DELIVERY.

§ 172. *Place of Delivery:*

If no other place is called for by the contract, then the goods are to be delivered where they are usually kept; that is, the shop, store, farm, etc. Goods in possession of, or on premises of, third persons, in absence of

any stipulation to the contrary, are deliverable where they are, the seller having previously provided for the vendee's license to remove them. Unless the vendor expressly agrees, or unless usage or custom impliedly requires it, the vendor is under no obligation to carry the goods, but the vendee must come and take them away.

Janney v. Sleeper, 30 Minn. 473, 16 N. W. R. 365.
Goddard v. Binney, 115 Mass. 450.
Gray v. Walton, 107 N. Y. 254.
Smith v. Gillett, 50 Ill. 290.
Frazier v. Simmons, 139 Mass. 531.
Partridge v. Wooding, 44 Conn. 277.
Sedgwick v. Cottingham, 54 Iowa, 512.
Dakota Stock Co. v. Price, 22 Neb. 96, 34 N. W. R. 97.
Hatch v. Oil Co., 100 U. S. 134.
Tyler v. City of Augusta (Me.), 34 Atl. R. 406.

§ 173. *Time of Delivery:*

If no time of delivery is mentioned, then the buyer has a reasonable time in which to get the goods, and, on the other hand, if by the contract the seller is to carry the goods to the buyer, no time being specified, the seller has a reasonable time in which to deliver. If the contract specifies the time, its construction is for the court, not for the jury. In general, the word "month" means a calendar month. In counting "days," the enumeration begins with the day after the date of the contract, and continues consecutively, including Sundays, although if the day of delivery thus falls on a Sunday or a legal holiday, the time is the next following day. As to the hour of the day at which delivery must be made, the rule is that it must be not later than a "reasonable" hour, thus leaving the circumstances to govern.

Danforth v. Walker, 40 Vt. 257.
Coon v. Spaulding, 47 Mich. 162.
Corwith v. Colter, 82 Ill. 585.

Hunter v. Wetsell, 84 N. Y. 549.
 Kuuntz v. Tompel, 48 Mo. 75.
 Weeks v. Hull, 19 Conn. 376.
 Isaacs v. Plaster Works, 67 N. Y. 124. (Construing "immediately.")
 Rhodes v. Cleveland Rolling Mill Co., 17 Fed. R. 426. ("As soon as possible.")

§ 174. *Degrees of Evidence of Delivery:*

(1) Passing the property to vendee.

Bissell v. Balcom, 39 N. Y. 275.
 Merrill v. Parker, 24 Me. 89.
 Coon v. Spaulding, 47 Mich. 132.
 Goddard v. Binney, 115 Mass. 450.
 Philbrook v. Eaton, 134 Mass. 400.
 Corning v. Records (N. H., 1900), 46 Atl. R. 462.
 McNamara v. Edmister, 11 Hun, 597.
 Maclary v. Turner (Del.), 32 Atl. R. 325.

§ 175. (2) Action for "goods sold and delivered."

Spicers v. Harvey, 9 R. I. 582.
 Bement v. Smith, 15 Wend. 493.
 Hart v. Summers, 38 Mich. 399.
 Frazier v. Simmons, 139 Mass. 531.
 Greenleaf v. Hamilton (Me., 1900), 46 Atl. R. 798.
 Messer v. Woodman, 22 N. H. 173.

NOTE.—The reader will remember that the distinction as to delivery in "goods bargained and sold," and "goods sold and delivered" belongs to common-law pleading, and disappears where that system of pleading has been displaced by a code which does not retain the "common counts."

§ 176. (3) Defeating vendor's lien for price.

Freeman v. Nichols, 116 Mass. 309.
 Thompson v. Wedge, 50 Wis. 642.
 McNail v. Ziegler, 68 Ill. 224.
 Leven v. Smith, 1 Denio, 573.

§ 177. (4) Defeating right to stop in transit.

This topic is treated more fully in a subsequent section.

§ 178. (5) Passing property against creditors and subsequent purchasers.

Winslow v. Leonard, 24 Pa. St. 14.

Lamb v. Durant, 12 Mass. 54.

Lanfear v. Sumner, 17 Mass. 110.

Burnell v. Robertson, 10 Ill. 282.

Daniels v. Nelson, 41 Vt. 161.

Huebler v. Smith, 62 Conn. 186, 25 Atl. R. 658.

Corning v. Records (N. H., 1900), 46 Atl. R. 462.

§ 179. *Delivery to Common Curriers:*

Delivery of the goods to a common carrier for carriage to the vendee is, as a rule, delivery to the vendee, the carrier being the vendee's agent for that purpose. The contract, however, may call for carriage by the vendor, and in that case, of course, delivery to the carrier would not constitute delivery to the vendee. In cases of dispute as to whose agent the carrier is, the circumstances are evidence; such, for example, as the paying of the freight by the vendor, although that, of course, is not necessarily conclusive. It is the vendor's duty to see that the goods are properly addressed, packed, etc., when he undertakes to ship them for transportation.

Hobart v. Littlefield, 13 R. L. 341.

Philadelphia R. R. Co. v. Wireman, 88 Pa. St. 264.

Kessler v. Smith, 42 Minn. 494.

Ramsey & Gore Mfg. Co. v. Kelsea, 55 N. J. L. 320, 22 L. R. A. 415, and note.

Brewing Ass'n v. Nipp, 6 Kan. App. 730.

Whiting v. Farrand, 1 Conn. 60, 37 id. 550.

Wilcox Silver Plate Co. v. Green, 72 N. Y. 17.

Wilson v. Western Fruit Co. (Ind.), 38 N. E. R. 827.

Garretson v. Selby, 37 Iowa, 529.

§ 180. *Actual and Constructive Delivery:*

Reference has previously been made to the different form or manner in which delivery may take place, such as actual, constructive, or symbolic. By actual delivery is meant a real, visible, manual delivery of the subject-

matter of the sale. It is a corporal transfer of the chattel or of the goods. A constructive delivery is one which although not actual or real, in the sense of the bodily transfer of the object, is, nevertheless, held, by *construction of law*, to be equivalent to an actual or real delivery, the law interpreting certain acts of the parties as satisfactorily showing their *intention*. This most frequently occurs when the articles sold are of great bulk or weight, and, therefore, not capable of convenient manual transfer; also, when the goods are in possession of third persons, and notice of the sale is given to such bailees. The delivery, however, often spoken of in connection with the passing of title is a *constructive* delivery, since the law by the fact of the closing of the contract, and the payment of the price, construes a delivery as thus being the intention of the parties.

§ 181. *Symbolic Delivery:*

Symbolic delivery is a delivery by transferring the goods by means of some symbol, token, or representative of the goods. It is the use of *one* thing to *represent another* thing, that is, the thing transferred. Symbolic delivery may be a kind of constructive delivery, but it is not true that every constructive delivery is a symbolic delivery. The delivery of a bill of lading is the most common illustration of symbolic delivery, the bill of lading being the symbol of the goods. The delivery of the bill of sale of a vessel at sea is also a symbolic delivery. Warehouse receipts, or receipts for the storage of cotton, grain, etc. (common in communities where large quantities of grain are stored in elevators, or other merchandise in other places of storage), are also deliverable as symbols of the goods stored.¹

¹ It should be remembered, however, that warehouse receipts are, generally, not *negotiable*, unless by force of statute. Some states, however, recognize their negotiability even in absence of statute.

The delivery of a small portion of a large mass, such as a handful of grain out of a bin full, is sometimes referred to as illustrative of symbolic delivery; likewise, the handing over of a key to a warehouse containing the goods sold. Neither, however, correctly, is symbolic delivery, since the first is, for some purposes, evidence of *constructive* delivery, as showing the intention of the parties, while the latter is, properly, a real or an actual delivery, since the giving up of the key places the vendee in physical control or in actual possession of the goods. In neither case is a token or a symbol, as a *representative* of the goods, delivered, but a part of the goods themselves, or some article, not a *symbol*, but a *means* by which the goods are brought under personal control.

§ 182. Constructive and symbolic delivery are questions of great importance when *actual* delivery is either impossible or impracticable. Although it is not accurate, in a sale, to speak of "impossible delivery," since everything that is the subject of a sale must, from the very nature of the case, be capable of some kind of delivery, nevertheless, a *manual* delivery may, at the time, be impracticable or impossible, and then the importance of constructive or symbolic delivery arises. Growing crops are often sold. How can they be actually delivered at the time? In no way, since delivering the land itself takes us out of the province of sales of personal property, and takes us into the consideration of sales of realty. In such cases it is difficult to provide for such a delivery as will hold against creditors. In one case (*Lamson v. Patch*, 5 Allen, 586) the delivery of a handful of grass was *held*, as against creditors, not a delivery of the grass crop. In another instance (*Graff v. Fitch*, 58 Ill. 373), however, part of a crop of growing corn was *held* to be constructively

delivered by being separated from the rest of the field by a row of lopped tops.

Dempsey v. Gardner, 127 Mass. 381, 34 Am. R. 388.
Lake v. Morris, 80 Conn. 201.
First National Bank v. Northern R. R. Co., 58 N. H. 203.
Webster v. Anderson, 42 Mich. 554, 36 Am. R. 452.
Campbell v. Hamilton, 63 Iowa, 293.
Hight v. Harris, 56 Ark. 98, 19 S. W. R. 235.
Stimson v. Wrigley, 86 N. Y. 332.
Seavey v. Walker, 108 Ind. 78, 9 N. E. R. 347.
Jewett v. Warren, 12 Mass. 300.
Scranton v. Coe, 40 Conn. 159.
Ricker v. Cross, 5 N. H. 570.
Kingsley v. White, 57 Vt. 565.
Hayden v. Demets, 53 N. Y. 426.
Graff v. Fitch, 58 Ill. 373.
Kellogg Co. v. Peterson, 162 Ill. 158, 44 N. E. R. 411.
Wilkes v. Ferris, 5 Johns. 335.
Yale v. Seely, 15 Vt. 221.

§ 183. *Quantity to be Delivered:*

It is the duty of the vendor to deliver the exact quantity called for by the contract, when the quantity is specified. To deliver more or less is not a performance, when the contract calls for an exact amount. If, however, more or less be delivered, the vendee has an election. He may accept the amount delivered, paying for what he accepts, or he may refuse to accept at all. It surely is not a vendee's duty to pick out the goods which he has ordered, when the goods are delivered in a mixture with other goods. The effect of a breach in delivery where the contract calls for an instalment delivery, and the effect upon title in instalment deliveries and payments, have been previously considered.

Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12.
Stevenson v. Burgin, 49 Pa. St. 36.
Perry v. Mt. Hope Iron Co., 16 R. I. 318, 15 Atl. R. 87.
Lockhart v. Bonsall, 77 Pa. St. 53.

Avery v. Wilson, 81 N. Y. 341.

Brawley v. United States, 96 U. S. 168. (Order for "more or less.")

Clapp v. Thayer, 112 Mass. 296. ("About so much.")

§ 184. *Delivery F. O. B.:*

In a contract calling for a delivery free on board, the seller undertakes to make actual delivery of the goods to the carrier, including payment of cartage charges to the ship or car. If the buyer is to name the line of transportation, then the seller is not required to act until the buyer designates the ship or route.

Bartels v. Redfield, 16 Fed. R. 337.

Robertson v. Downing, 127 U. S. 607.

Dwight v. Eckert, 117 Pa. St. 508.

4. ACCEPTANCE.

§ 185. Correlative to the duty of the vendor to deliver is the duty of the vendee to accept and to pay.

In connection with the Statute of Frauds, "acceptance" and "receipt" were both considered. It should be remembered that the two terms are not synonymous, although often so used. Acceptance is a *mental* act, being the assent of the buyer that the goods conform to the contract, while receipt is the buyer's taking of the goods with the consent of the seller. Both ideas are united in the general and popular use of the term "acceptance," but either may exist without the other. Receipt always presumes delivery, while acceptance may precede, be concurrent with, or may follow delivery. In this country there is no difference between the idea of acceptance as used in the Statute of Frauds and acceptance as used in the performance of the contract. Each is considered to be a *final* act, although the English authorities speak of acceptance under the Statute of Frauds as any act which

deals with the goods in recognition of an existing contract.

Morton v. Tibbett, 15 Q. B. 428.

The buyer has, of course, a right to inspect the goods as delivered, and therefore his receipt of the goods for inspection is not acceptance. Receipt may become acceptance, however, or, better, acceptance may be inferred from receipt when the buyer unreasonably delays to signify his acceptance. Acts amounting to acts of ownership will also be construed to denote acceptance. Even where a rejection follows inspection, such rejection may be deemed to have been waived and acceptance to have been substituted, when the goods are subsequently used by the vendee. Delivery and acceptance are both matters of fact, in the sense that what the parties did, is for the jury to answer. So far as acceptance depends upon delivery, it will be remembered that, in absence of other agreement, the buyer must go after the goods, that is must go to the place where the goods are ready for delivery.

Greenleaf v. Hamilton (Me., 1900), 46 Atl. R. 798.

Coplay Iron Co. v. Pope, 108 N. Y. 282.

Windmill Co. v. Piercy, 41 Kan. 763. (A stipulated thirty-days notice.)

Cream City Glass Co. v. Friedlander, 84 Wis. 53, 21 L. R. A. 135.

Schloss v. Feltus, 96 Mich. 619, also 103 Mich. 525, 36 L. R. A. 161, and note.

Barton v. McKelway, 22 N. J. L. 165.

Treadwell v. Reynolds, 39 Conn. 31.

Pierson v. Crooks, 115 N. Y. 539.

5. PAYMENT.

§ 186. It has been previously emphasized that the buyer is not entitled to the possession of the goods until he pays for the same or tenders the price. A contract of sale is always presumed to be a sale for *cash*, and credit is given only by express agreement. The popular and trade-term

expressions, as "spot cash," "thirty days cash," etc., require no discussion here, for, unless such terms have specifically entered into the sale, they have no meaning, and, when employed, then usage and custom may properly be called upon to determine their significance. Payment must be in *money* or in money's worth, since the very definition of a sale includes this. The law as to payment by *negotiable* checks, drafts or notes varies in different jurisdictions, some states holding that such paper, when negotiable, amounts to a *prima facie* payment, while other jurisdictions do not admit this. A full discussion of this question belongs rather to the subject of bills and notes. If the vendor authorizes the money to be sent by mail, or by other means, and it is so sent, then the loss, if any, properly falls upon the vendor. The risk, however, is the vendee's if he so sends money without such instructions.

Gray v. Walton, 107 N. Y. 254.
Paul v. Reed, 52 N. H. 136.
Behrends v. Beyschlag, 50 Neb. 304.
Jennings v. West, 40 Kan. 372.
Clark v. Savage, 20 Conn. 258.
Jagger Iron Co. v. Walker, 76 N. Y. 521.
Dodge v. Emerson, 131 Mass. 467.
Warriner v. People, 74 Ill. 346.
Mordis v. Kennedy, 23 Kan. 408.
Palmer v. Phoenix Mut. Ins. Co., 84 N. Y. 63.
Downey v. Hicks, 14 How. 249.
Thompson v. Kelly, 101 Mass. 291, 3 Am. R. 353.

§ 187. *Tender:*

When it becomes the duty of the vendee to pay, if, for any reason, the vendor is unwilling to accept the price, nevertheless the vendor may perform his whole duty in the matter by tendering, in legal money, the exact sum. The effect of this act of tender on the vendor's part is to prevent from the time of tender all future interest on the debt, and also all liability for subsequent costs. The

tender, however, must be for the whole amount due, a partial tender being insufficient. It must also be an actual tendering of the money, and not a mere statement of willingness to do so. When once tendered, the money must be ready for the vendor whenever he may demand it. This is what is known as keeping the tender good. It is the practice, when tender of payment is the defense to an action for a debt, to pay the money into court, whereupon, if the tender be proven, the plaintiff is, of course, entitled to the same, but costs are taxed against him, the technical judgment being for the defendant, or the vendee.

At the present time, in this country, all United States coins (not foreign coins) are legal tender as follows: Gold, any amount, when not below the limit of tolerated weight in any piece; silver dollars, any amount; subsidiary silver coins, up to ten dollars; "nickels" and "cents," to twenty-five cents. The *treasury notes* of the United States are good for any amount, but the *silver certificates* and the *national bank notes* are not legal tender for all purposes. It is competent, however, for the contracting parties to specify in what kind of money the price shall be paid, as, for example, in gold.

Wright v. Behrens, 39 N. J. L. 413.

Nelson v. Robson, 17 Minn. 284.

Potts v. Plaisted, 30 Mich. 149.

Taylor v. Brooklyn Elev. R. Co., 119 N. Y. 561, 23 N. E. R. 1106.

Francis v. Deming, 59 Conn. 108.

Tompkins v. Batie, 11 Neb. 147.

Crain v. McGoan, 86 Ill. 431.

Trebilcock v. Wilson, 12 Wall. 687.

"Legal Tender Cases:"

In connection with this topic the student is advised to read the famous "legal tender cases," viz.:

Hepburn v. Griswold, 8 Wall. 604.

Knox v. Lee; Parker v. Davis, 12 Wall. 457, 540.

See also Juilliard v. Greenman, 110 U. S. 421.

PART V.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

I. LIEN.

§ 188. As we have seen, it is not essential in order to transfer the property that there should be either delivery or payment. The intention of the parties passes the title, and, although the property has passed, nevertheless the vendor is under no obligation to yield possession, or to deliver, until payment, or tender, by the vendee. This right of the vendor to hold the goods until he is paid, although the title has passed, is called a vendor's lien. This right of lien, together with the right of stoppage *in transitu*, in case of the insolvency of the vendee, is often treated under titles referring to the breach of the contract, but neither right necessarily implies a breach of the contract, and it is more logical to consider them apart from the remedies of the vendor upon the breaking of the contract by the vendee. There is no lien unless the property has passed, for the very meaning of a lien is a right to retain in one's possession the goods of *another* until certain charges, costs or prices connected with the goods have been paid. In a vendor's lien, however, the right covers only the PRICE, not charges, since any expense incurred by the vendor in storing or in keeping the goods becomes a personal charge against the vendee, and is not to be included within the lien.

§ 189. A lien is the very best kind of protection a seller can have. In general, a lien is superior to all other kinds of security. A lien is stronger than a debt, a law-suit or

an attachment. A "set-off" cannot be balanced against it, neither is it affected by statutes of limitation. It is not lost by a sub-sale of the vendee, unless accompanied by a bill of lading or other transferable document of title. It is often said that liens are enforced by sale of the goods in order to satisfy the price. No vendor's lien, by its own force, carries with it the right to sell. Unless there be some statute (and such statutes are now common, especially in reference to perishable goods, and particularly applying to carriers' liens) authorizing the lienor to dispose of the goods, he holds them, in theory, in the custody of the law. Upon *breach* of the contract by the vendee, however, one of the remedies of the vendor, who still has the goods in his possession, is to sell the same, as we shall see in the next part of this work. This right, however, arises as a remedy upon the breach of the contract, and is not a sequence of the lien. The vendor may demand payment, as is his right, and, upon the refusal or neglect of the vendee to pay, he may then sell the goods, as agent for the vendee, basing, however, this right upon the breach by the vendee, and not upon his right of lien. The same principle also applies in stoppage *in transitu*.

§ 190. The right of a seller to a lien may be waived by his agreement to give credit, although the goods remain in his possession. Upon the expiration of the term of credit, however, should the vendee then fail to pay, the lien revives. The insolvency, also, of the vendee, during the time given for credit, causes the lien to attach. Delivery of the goods, when unconditional, destroys, of course, the lien, since by its very nature it depends upon the possession of the goods by the vendor. If, however, only a part of the goods are delivered, the lien for the full amount of the price remains with the undelivered portion. In connection with the general subject of delivery,

symbolic delivery by means of bills of lading, warehouse receipts, etc., was referred to. When such documents of title are delivered to the vendee, and by him transferred to *bona fide* purchasers, the lien of the vendor is lost. This principle is more frequently illustrated, however, in the doctrine of stoppage *in transitu*. The vendor may, of course, deliver the goods to a carrier, yet retain his lien by a reservation of the *jus disponendi*.

Bloxam v. Sanders, 4 B. & C. 941.
Wade v. Moffett, 21 Ill. 110.
Burke v. Dunn (Mich.), 75 N. W. R. 931.
Tuthill v. Skidmore, 124 N. Y. 148.
Leavey v. Kinsella, 39 Conn. 50.
McElwee v. Lumber Co., 69 Fed. R. 302.
Ware River Co. v. Vibbard, 114 Mass. 447.
Schmertz v. Dwyer, 53 Pa. St. 335.
Muller v. Pondir, 55 N. Y. 325.
Sullivan v. Clifton, 55 N. J. L. 324.
White v. Welsh, 32 Pa. St. 396.
Burton v. Curyea, 40 Ill. 320.

2. STOPPAGE IN TRANSITU.

§ 191. After the goods have been delivered into the actual possession of the vendee, the right of lien, as we have seen, is gone. Likewise when the goods have been delivered to a carrier, either by land or water, for transit, the lien, in general, is lost. Should the vendor learn, however, while the goods are in transit, of the insolvency of the vendee, the vendor may stop the goods, thereby restoring his lien. As was said before, this right of stoppage *in transitu* was unknown to the early common law. It is said to have been an ancient custom of merchants, a doctrine of the *lex mercatoria*, and Mr. Benjamin tells us¹ that the earliest chancery case upon the subject was in 1690, and the first common-law recognition of the doctrine was in 1757.

¹ Benjamin on Sales, § 829, note (b).

The theory of the doctrine of stoppage *in transitu* is that it is simply an extension of the vendor's lien, the vendor's rights in the goods after the stoppage being the same as under his common-law lien before the delivery to the carrier.

By "insolvency" of the vendee is not meant, necessarily, any formal assignment on his part, or any application for the benefits of a bankrupt law, voluntarily or involuntarily; but any overt act of insolvency of the vendee, such as his failure to meet an obligation when presented or due, is sufficient to authorize the vendor to stop the goods. Neither is it necessary that the act of insolvency should have occurred *after* the sale. The fact of *present* insolvency is the material question, regardless of the exact time of its origin.

The transit begins as soon as the goods are delivered to the carrier for transmission to the vendee, and it ends when the goods reach their destination and the rights of the carrier as *carrier* have ceased. By this it is meant that, if the carrier still holds the goods as *carrier*, by virtue of a carrier's lien, the goods are still in transit, and may be stopped by the vendor. The transit also terminates if the goods come into the lawful possession of the vendee at some intermediate place *en route*, since this would imply a delivery to the vendee.

Although credit may have been given, yet, as in case of lien, the right to stop the goods, the buyer being insolvent, arises, and as to partial payments or partial deliveries the same principles apply as in lien, that is, the vendor may stop the portion of the goods in transit for a lien upon them to the amount of the balance due. The right may be exercised by the vendor or any duly authorized agent acting for him, and due notice to the carrier or his duly appointed agents to stop the goods is sufficient. It is not necessary that the vendor should take

actual possession, but it is necessary that, in case of notice sent to the carrier, the latter should have sufficient time in which to notify *his* agent, in order to prevent the delivery of the goods.

Mere attachment by creditors of the vendee, or resale, without delivering the bill of lading, by the vendee, before the goods have come into the possession of the vendee, or before they have reached their destination, does not defeat the right; but the *transfer* of a bill of lading, if sent by the vendor to the vendee, to a *bona fide* purchaser from the vendee, for value, and *if transferred before the stoppage*, does defeat the right, since such a transfer is symbolic delivery, and sufficient to vest right of possession in the innocent sub-purchaser.

Lickbarrow v. Mason, 2 T. R. 63; 6 East, 21; 2 Sm. L. C. 1045 (9th ed.).

Rogers v. Thomas, 20 Conn. 54. (This case *holds* that insolvency must arise *after* the sale, which doctrine is, surely, not the accepted principle. See the prevailing doctrine stated in the two following cases.)

Kingman v. Denison, 84 Mich. 612.

Garden Cultivating Co. v. Mo. Ry. Co., 64 Mo. 305.

Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. R. 1124.

Brooke Iron Co. v. O'Brien, 135 Mass. 442.

Loeb v. Peters, 63 Ala. 243.

Symns v. Schotten, 35 Kan. 310.

Wheeling & L. E. R. Co. v. Koontz (Ohio, 1900), 56 N. E. R. 471.

Poole v. Railroad Co., 58 Tex. 134.

Millard v. Webster, 54 Conn. 415. (Following Rogers v. Thomas, *supra*. Not adopted elsewhere, however.)

Rucker v. Donovan, 13 Kan. 251.

Potts v. Railroad Co., 131 Mass. 455.

Newhall v. Railroad Co., 51 Cal. 345. (This case carries the bill of lading doctrine beyond reason, holding that the transfer of a bill of lading, even *after* stoppage, deprives the vendor of his lien. As we have seen, however, a *lien* when once obtained is not divested by any other adverse right. The California doctrine is unknown elsewhere.)

Evansville R. Co. v. Erwin, 85 Ind. 457.

Pollard v. Vinton, 105 U. S. 7.

Seal v. Zell, 63 Md. 356.

§ 192. *Other Documents of Title:*

In connection with the rule as to symbolic delivery by means of bills of lading, it will be remembered that in some states by statute, and in others by judicial holdings, warehouse receipts are made, for the purpose of delivery, equally effective with bills of lading. Among the states which have made such documents of title symbols of delivery by statute are California, Connecticut, Illinois, Indiana, Iowa, Kansas and Maine.

Second Nat. Bank v. Walbridge, 19 Ohio St. 424.

Griswold v. Haven, 25 N. Y. 595.

Merchants' Bank v. Hibbard, 48 Mich. 118, 11 N. W. R. 834.

National Bank v. C. B. & N. Ry. Co., 44 Minn. 224, 46 N. W. R. 560.

Bryan v. Congdon, 54 Kan. 109.

3. RIGHT OF RESALE BY THE VENDOR.

§ 193. The common-law right of lien, and the restoration of the lien by the doctrine of stoppage *in transitu*, give, by their own force, no right to the vendor to resell the goods. Neither right implies a rescission of the contract. The vendee is still entitled to possession of the goods upon payment or tender of the price. As a practical result, however, resale often follows the exercise of the right of lien, or of stoppage *in transitu*, but this is because resale is one of the remedies of the vendor upon the breach of the contract. The vendor may also hold the goods by virtue of his lien, and sue the vendee for the contract price. Resale will be considered under "Remedies of the Vendor upon Breach by the Vendee," in which place the subject properly belongs.

PART VI.

REMEDIES UPON BREACH OF THE CONTRACT.

Under this title will be discussed, first, the remedies of the vendor upon a breach of the contract by the vendee, and secondly, the remedies of the vendee upon a breach on the part of the vendor.

A. THE VENDOR'S REMEDIES.

1. AGAINST THE GOODS.

§ 194. The remedies of the vendor are, in their character, twofold. The vendor, under certain circumstances, has remedies against the goods themselves, of an *in rem* nature, and in addition to such remedies he has his personal actions against the vendee. In order to proceed against the goods they must be in the vendor's possession, or, at least, not in the vendee's possession, because just as soon as the goods are in the possession of the vendee, by unconditional delivery, there can be no action against them. We have noticed how the vendor has a lien for the price when the goods are as yet undelivered, and how even after a delivery to the carrier the vendor may regain possession of the goods by stopping them in transit, in case of the insolvency of the vendee. Aside from these remedies, neither of which necessarily involves any breach of the contract by the vendee, the vendor (the property having passed), in case of actual breach by the vendee, such, for example, as a refusal to

pay, may, by virtue of his right of lien, hold the goods for the vendee, and sue him for the contract price; or, as a strict remedy against the goods alone, the vendor may, as agent for the vendee, sell the goods, and, in addition to what he receives for them at the resale, may recover his remaining damages, if any.

§ 195. Principles of Resale:

Where the vendor, as a remedy for breach of contract, undertakes to resell the goods, such resale implies that the title to the goods is in the vendee, and therefore the vendor acts not as owner but as agent for the vendee. He should, in general, give notice to the vendee of the time and place of the sale, in order that the vendee may have full opportunity to be represented at the sale if he so desires. It is sometimes said that such notice is not legally necessary, and circumstances may dispense, no doubt, with the requirement of such notice; but, in general, in order to show good faith and to avoid all questions as to the legality of the sale, it is wiser for the vendor to notify (preferably in writing) the vendee of such time and place.

As to time, it should be within a reasonable time after the breach, in order that the price, in a possibly falling market, may not be endangered. The place of sale is usually at the place of delivery, but not necessarily so. There may be no suitable market there. In general, the sale should be made at the nearest suitable market, and if so made, especially by a public sale, the selling price may reasonably be held to be a fair market price for the goods. In case of failure on the part of the vendor to observe every reasonable rule of duty in the sale, the price received may be disputed by the vendee as being a fair market price.

The measure of damages in resale is the difference be-

tween the fair market price received and the contract price, *plus* reasonable expenses necessarily connected with the resale. Should, of course, the reselling price exceed the damage, the balance, the goods being the vendee's, belongs to the latter.

Pickering v. Bardwell, 21 Wis. 562.

Van Brocklen v. Smeallie, 140 N. Y. 70. (Reversing same case in 64 Hun, 467.)

Dustan v. McAndrew, 44 N. Y. 72.

Brownlee v. Bolton, 44 Mich. 221.

Hickock v. Hoyt, 33 Conn. 553.

Rickey v. Tenbroeck, 63 Mo. 567.

Bagley v. Findlay, 82 Ill. 525.

§ 196. *Vendor Holding Goods for Himself—Rescission:*

In one of the above cases (*Dustan v. McAndrew*, 44 N. Y. 72), it is said that, as one of the remedies against the goods, the vendor may hold the goods for *himself*, and sue for any balance of damages. This question did not arise in the facts of the case, and therefore the statement amounts to only a *dictum*, and the author has not been able to find any American cases bearing directly upon this point. Holding goods, upon breach by the vendee, for one's self, is practically, if not absolutely, a rescission of the contract. The English rule is that the vendor can make no rescission without special agreement, upon failure of payment by the vendee, although it is the general rule that, for failure of the vendor to *deliver*, the *vendee* has the right to rescind. Courts, generally, treat more leniently a failure to *pay* than a failure to *deliver*. There is reason, however, in the rule laid down in *Dustan v. McAndrew*, and in certain cases it would seem to be both convenient and equitable. The Roman law permits rescission by the vendor upon failure of the vendee to pay, but this, it is contended, is not the English or the common law. A resale by the vendor, upon default of vendee, implies no

rescission, since the vendor, in such cases, acts as agent for the vendee. If the vendor can hold the goods for himself, it would seem to be justified rather upon the principle of permitting the vendor to be the privileged repurchaser at the current market price of the goods, rather than upon the doctrine of rescission. There are other *dicta* upon this alleged remedy of rescission prior to the case of *Dustan v. McAndrew*, and a writer of high authority, Prof. F. M. Burdick, of Columbia University School of Law, says, in his work on Sales (p. 243), that "it is the general rule in this country that the seller upon the buyer's default . . . may, although title has passed to the buyer, elect to keep the property as his own and recover damages for the buyer's breach." The cases which are cited, however, in illustration of this view do not turn upon facts which squarely bring the question up for decision, viz.:

Hayden v. Demets, 53 N. Y. 426. (*Dictum.*)

Bridgford v. Crocker, 60 N. Y. 627. (In this case the contract was an *executory* one.)

Neis v. O'Brien, 12 Wash. 358, 41 Pac. R. 59. (A resale.)

For other *dicta*, see

Mason v. Decker, 72 N. Y. 595.

Bagley v. Findlay, 82 Ill. 524.

Ames v. Moir, 130 Ill. 582, 22 N. E. R. 535.

The leading English case, holding against the doctrine of rescission in such cases, is

Martindale v. Smith, 1 Q. B. 389.

2. REMEDIES AGAINST THE VENDEE.

§ 197. Personal actions against the vendee, and the measure of the damages thereof, depend upon the form of the contract. It may be *executory* or *executed*. In the former case, the goods at the time of the breach by the

vendee may or may not be ready for delivery. This gives rise to three rules for damages.

§ 198. *Contract Executory; Article Incomplete:*

Here, of course, no title has passed, and, therefore, no action for the *price* lies, since such an action presumes title in the vendee. The action is for the non-acceptance by the vendee, and may be brought at once, upon notice of the vendee's refusal to accept, or it may be brought after the contract date of delivery. In either case, however, the measure of damages is the actual loss suffered by the vendor, that is, the profits which would have accrued to the vendor had the vendee performed his duty of acceptance.

Tufts v. Weinfeld, 88 Wis. 647, 60 N. W. R. 992.

Hosmer v. Wilson, 7 Mich. 294.

Hinckley v. Steel Co., 121 U. S. 264.

Allen v. Jarvis, 20 Conn. 38.

§ 199. *Contract Executory; Goods Ready for Delivery:*

Here again, no title having passed, the action is for non-acceptance. But the goods, although ready for delivery, may not, by the terms of the contract, be deliverable till a future date, and the vendee's refusal to accept may be either before the contract time for delivery, or may be at the time for the performance of the contract. In case refusal is made before the stipulated time for delivery, the vendor may sue at once, or he may disregard the notice, and at the time for delivery hold the vendee responsible, thus making the vendee's refusal equivalent to a refusal made then for the first time. The measure of damages is the difference between the market value *at the time for delivery* (no matter whether the vendor sues *at once* or waits for time of delivery) and the contract price. If the article was of value to the vendee alone, and, on account of being ordered for some special purpose, of no *market* value, then the measure of damages is

the full contract price. In general, it is for the jury to say what the market value is.

Atkinson v. Bell, 8 B. & C. 277.

Kountz v. Kirkpatrick, 72 Pa. St. 376.

Geiss v. Hardware Co., 37 Kan. 130.

Unexcelled Fireworks Co. v. Polites, 130 Pa. St. 536, 18 Atl. R. 1058.

Moody v. Brown, 34 Me. 107, 56 Am. Dec. 640.

Bridgford v. Crocker, 60 N. Y. 627.

§ 200. *Action for the Price:*

As an exception to the rule just stated in actions for the price in *executory* contracts, some cases hold that full performance on the vendor's part, including tender of the goods, passes, *per se*, the right of property to the vendee, especially when the goods have been made for a special order, and, therefore, the measure of damages is the full price.

Hayden v. Demets, 25 N. Y. 426.

Shawhan v. Van Nest, 25 Ohio St. 490.

Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. R. 210.

§ 201. *Contract Executed:*

When the contract is fully executed, and, therefore, the property passed, then, regardless of the fact whether there has been actual delivery or not, the vendor, being ready to deliver if delivery has not been made, and having performed his full duty, has his action for the full contract price. If credit has been given, the action must await the expiration of the term of credit, although insolvency would waive the credit:

Doremus v. Howard, 23 N. J. L. 390.

Ganson v. Madigan, 13 Wis. 67.

Ballentine v. Robinson, 46 Pa. St. 177.

Morse v. Sherman, 106 Mass. 430.

Frazier v. Simmons, 139 Mass. 531, 2 N. E. R. 112.

Indianapolis R. Co. v. Maguire, 62 Ind. 140.

Bement v. Smith, 15 Wend. 493.

Pardee v. Kanady, 103 N. Y. 121, 2 N. E. R. 885.

Wade v. Moffett, 21 Ill. 110.

§ 202. Vendor's Actions for Fraud:

If the goods have been obtained by the vendee through fraud, the vendor may elect to sue in contract or in tort. The action of *case* is the proper action (in common-law procedure) for any fraud or deceit, when the action is prosecuted independently of the contract. The vendee may also sue in contract (*covenant, debt* or *assumpsit*, according to the circumstances), although an action *ex contractu* is a recognition, or affirmation, of the sale. The student should remember that in actions based upon *fraud* there is a difference in the character of actions at law and suits in equity to rescind a contract for misrepresentation. In the *law* action there must be an allegation of *intentional* deception, the *scienter* must be alleged; while in suits in equity the *misrepresentation* of a material fact is the essential thing, regardless whether it was made wilfully or through honest mistake.

Upton v. Vail, 6 Johns. 181.

Culver v. Avery, 7 Wend. 380.

Arthur v. Griswold, 55 N. Y. 400.

Brackett v. Griswold, 112 N. Y. 454.

§ 203. Apart from the actions based upon the allegations of fraud, the vendor may, of course, where fraud was used, rescind the contract, and sue in trover, or may, if he desires, recover, generally, his goods by replevin.

Bacon v. Davis, 30 Mich. 157.

Aber v. Bratton, 60 Mich. 357, 27 N. W. R. 564.

Heineman v. Steiger, 54 Mich. 232, 19 N. W. R. 965.

Bruner v. Dyball, 42 Ill. 34.

B. THE VENDEE'S REMEDIES.**§ 204. There are various remedies to which the vendee may resort, upon the breach of the contract by the vendor, depending upon the character of the contract, the nature of the breach, and upon the possession of the**

goods. The subject conveniently divides itself into two heads: first, remedies *before* the vendee has obtained possession of the goods; and secondly, *after* the goods are in the vendee's possession.

1. BEFORE POSSESSION.

§ 205. Possession of the goods is not essential to the contract, whether it be executory or executed; but certain remedies of the vendee are possible only after the goods have come into his possession. Confining our attention, now, to remedies before possession has been obtained, we will note the difference, as to remedy, between the breach of an executory and of an executed contract.

§ 206. *Contract Executory:*

No title having passed, the only remedy of the vendee is for breach of contract (that is, for non-delivery) on the part of the vendor. The relations of the parties are exactly the same as in the breach of any contract, since there are no rights arising from the goods themselves, no property having passed. In the breach of an executory contract of sale, upon the refusal of the vendor to comply with the agreement, no tender of the price is necessary on the part of the vendee, since payment or tender is a concurrent condition with delivery, and the vendor having refused to deliver, or having by his acts (such as selling the goods in question to a third party) made delivery of the specific chattel impossible, may be held to have waived any right to a tender. It would certainly be unreasonable to require one to make tender when such action could have no influence upon the obtaining of possession. An action for damages, therefore, in executory contracts, is the only action open to the vendee. Neither trover nor replevin is admissible, since there has been no possession on the part of vendee.

§ 207. Measure of Damages:

In such cases the measure of damages is, generally, the difference between the market value of the goods, at the time and place of delivery, and the contract price. This is the rule as to *general* damages. There may be, also, under varying circumstances, *special* damages, or damages which are naturally, directly, or approximately caused by the breach of the vendor, especially if the vendor knew of the peculiar circumstances of the case. Some of the important elementary principles of the subject of damages are stated in the "Supplement" of this work, following the present division concerning remedies, and to that the student is referred in connection with this topic.

We have said that the general rule as to the measure of damages, in actions for the breach of the executory contract, is the difference between the contract price and the market price at the time and place of delivery. If there be no market price at the place of delivery, then the value at the reasonably nearest market is to be taken. If the article, on account of its peculiar purpose, has no market price, then the cost of its manufacture or production may measure its value.

Chapman v. Ingrain, 30 Wis. 290.

Collins v. Delaporte, 115 Mass. 159.

Brand v. Henderson, 107 Ill. 141.

Peters v. Cooper, 95 Mich. 191, 54 N. W. R. 694.

Boutell v. Warne, 62 Mo. 350.

Hinckley v. Pittsburg Steel Co., 121 U. S. 264, 7 Sup. Ct. R. 875.

Parker v. Pettit, 43 N. J. L. 512.

Griffin v. Colver, 16 N. Y. 489.

Lester v. East, 49 Ind. 588.

Mihills Mfg. Co. v. Day, 50 Iowa, 250.

Allen v. Jarvis, 20 Conn. 38.

Dingley v. Oler, 117 U. S. 503.

Grand Tower Co. v. Phillips, 23 Wall. 471.

Todd v. Gamble, 148 N. Y. 382.

Crystal Palace Flouring-Mill Co. v. Butterfield (Colo., 1900), 61
Pac. R. 479.

Dexter v. Norton, 47 N. Y. 62.

§ 208. *Rescission by Vendee:*

Whatever may be the difference of opinion as to the right of the vendor to rescind for non-payment by the vendee, it is generally agreed that for failure of the vendor to perform his part of the contract, the vendee may rescind and may recover any money he has paid. This is also true when the consideration totally fails, as in case of a forged note, void patent, etc. If, however, there has been a practical performance by the vendor, and accepted by the vendee, if such partial performance and acceptance be separable from the entire contract, then the vendee must pay for what benefits he has unconditionally accepted.

Cleveland v. Sterrett, 70 Pa. St. 204.

Howe Machine Co. v. Willie, 85 Ill. 333.

Smith v. Lewis, 40 Ind. 98.

Rubin v. Sturtevant, 80 Fed. R. 930.

Thayer v. Turner, 8 Metc. 550.

Robson v. Bohn, 22 Minn. 410.

§ 209. *Contract Executed; Title Passed:*

If the contract be executed, then the property has passed, although the goods may not as yet have come into the possession of the vendee. In such a case, upon the refusal or negligence of the vendor to deliver, the vendee, *upon making due tender*, may sue for non-delivery. It is important that tender be made, since, the goods being the property of the vendee, he is entitled to their possession upon performing his duty, which is that of payment or tender. Here, as in the previous case, the general rule of damages is the difference between the contract price and a fair market value at time and place of delivery. The same principles as to value apply as in the case of executory contracts, previously mentioned.

§ 210. *Price Prepaid:*

It may happen, however, that the price has been prepaid by the vendee. In that case he is entitled to recover the price paid (with interest), together with the measure of damages as above, that is, the difference between the contract price and the market value *at the time* and place of delivery. This is the general rule. Some states, however, permit the vendee, in case he has prepaid, to take advantage of the *highest* market value at *any* time between the breach and the action for damages.

Nelson v. Plimpton Co., 55 N. Y. 480.

Speyer v. Colgate, 67 Barb. 192.

Whitmarsh v. Walker, 1 Met. 313.

§ 211. *Market Value at Time of Delivery:*

The following cases illustrate the general rule as stated above:

Shepherd v. Hampton, 3 Wheat. 200.

Douglass v. McAllister, 3 Cranch, 298.

Hill v. Smith, 32 Vt. 483.

§ 212. *Highest Market Value Between Breach and Action:*

The second rule referred to in section 210 is set forth in the following decisions:

West v. Pritchard, 19 Conn. 212.

Gilman v. Andrews, 66 Iowa, 116.

Clark v. Pinney, 7 Cowen (N. Y.), 687.

§ 213. *Specific Performance:*

The equitable remedy of specific performance is occasionally resorted to in contracts of sale when the subject-matter of the sale is of such a peculiar character that it cannot be elsewhere obtained in the market, or when, by reason of some especial desire or affection for the particular article, no ordinary rules as to the measure of damages can be applied. The remedy, however, is a rare

one, and will not be granted when an action at law can give the vendee reasonable relief. In such instances, however, as sales of objects of art or antiquity, patent rights, claims against insolvent debtors, heirlooms, etc., the value of which no jury could be expected to measure by any common standard, decrees ordering specific performance have been granted.

Corbin v. Tracy, 34 Conn. 325.
Hapgood v. Rosenstock, 23 Fed. R. 86.
Cutting v. Dana, 25 N. J. Eq. 265.
Barton v. De Wolfe, 108 Ill. 195.
N. E. Trust Co. v. Abbott, 162 Mass. 143, 38 N. E. R. 432.
Johnson v. Brooks, 93 N. Y. 337.
Equitable Gas Co. v. Baltimore Co., 63 Md. 285.
Litz v. Goosling, 21 L. R. A. 127.

§ 214. *Actions in Tort:*

When the property has passed to the vendee, he has the right of possession, and upon that right, in addition to his remedies *ex contractu*, he may maintain, in tort, actions for conversion (trover), and, in some jurisdictions, for replevin. The common-law action in trover requires that it be preceded by a demand and a refusal. The action of replevin is now regulated generally by statute. The vendee, however, by his action for conversion cannot recover more than by his action in contract, and, in general, the measure of damages remains the same. If the property has passed, trover can also be maintained against third persons, subject, of course, to the principles relating to innocent second purchasers who rely upon the retention of the goods by the vendor.

Philbrook v. Eaton, 134 Mass. 398.
Esson v. Tarbell, 9 Cush. 407.
Freelove v. Freelove, 128 Mass. 190.
Koon v. Brinkerhoff, 39 Hun, 130.

2. AFTER OBTAINING POSSESSION.

§ 215. We now are to consider what the remedies of the vendee are, after he has obtained possession of the goods, for, although the goods may have been duly delivered, yet there may be some breach by the vendor in either an express or implied warranty, or the contract may be tainted with fraud. In any of these possibilities the vendee has his remedies.

§ 216. Right to Return the Goods:

In the first place, the vendee may, under certain circumstances, return the goods, namely, as follows:

- (1) When the goods are not of the kind or species bought. § 217.
- (2) When the goods were actually sold by sample, but they do not correspond to the sample. § 218.
- (3) Generally, for any other breach of an "implied warranty" or "condition" (keeping in mind the confusion in the use of these terms as outlined in the previous discussion of them). § 219.
- (4) Some jurisdictions permit a return, even after acceptance, upon breach of an *express* warranty, but this is not the general rule. § 220.
- (5) When the vendor has been guilty of fraudulent representation. § 221.
- (6) When the contract stipulates that the vendee may have the privilege of return.

§ 216a. If Returned, Must be Within a Reasonable Time:

This right of the vendee to return the goods, or his right to reject them, as it is frequently called, requires, of course, that the right shall be exercised within a reasonable time, and that the refusal to accept shall be duly communicated to the vendor. A physical redelivery of the goods is not necessary, if the vendee has notified the vendor of his re-

jection. As was observed under the topic of acceptance, the vendee's intention to accept or to keep the goods may be inferred from his acts, as well as affirmed by his words. As to what is a reasonable time, here, as in other cases, the circumstances of each particular sale must govern. If the vendee returns the goods he may recover what he has paid thereon, together with interest.

ILLUSTRATIVE CASES UPON RIGHT TO RETURN.

§ 217. Goods Not of the Kind or Species Bought:

It will be remembered that this does not include *quality*. See § 161.

Pope v. Allis, 115 U. S. 363, 6 Sup. Ct. R. 69.

Dailey v. Green, 15 Pa. St. 118.

Woodle v. Whitney, 23 Wis. 55.

Hoadley v. House, 32 Vt. 179.

Rubin v. Sturtevant, 80 Fed. R. 930.

Meader v. Cornell, 58 N. J. L. 375, 33 Atl. R. 960.

§ 218. Goods Not Corresponding with Sample:

The goods, however, must have been really sold by sample. See § 163.

Boothby v. Plaisted, 51 N. H. 436.

Magee v. Billingsley, 3 Ala. 679.

Field v. Kinnear, 4 Kan. 476.

§ 219. Breach of Any Implied Warranty, or Condition:

In addition to the preceding illustrations of implied warranties, there is a general right to return upon breach of any implied warranty, or condition.

Notes to Cutler v. Powell, 2 Sm. L. C. 37 (7th Am. ed.).

Fairfield Bridge Co. v. Madison Mfg. Co., 38 Wis. 346.

Norrington v. Wright, 115 U. S. 188.

Filley v. Pope, 115 U. S. 213.

§ 220. Breach of Express Warranty, Despite Acceptance:

A number of states permit a return upon breach of an express warranty as shown by the following cases:

Alden v. Hart, 161 Mass. 580.

Branson v. Turner, 77 Mo. 489.

Rogers v. Hanson, 35 Iowa, 287.

Sparling v. Marks, 86 Ill. 125.

Weybrich v. Harris, 31 Kan. 92.

There are similar decisions, also, in Maine, Nebraska, Wisconsin, and, possibly, in other states.

The *general* rule, however, that for breach of express warranty the vendee cannot, after acceptance, return the goods, but must rely upon his action for the breach, is set forth in the following authorities:

Thornton v. Wynn, 12 Wheat. 189.

Freyman v. Knecht, 78 Pa. St. 141.

Merrick v. Wiltse, 37 Minn. 41, 33 N. W. R. 3.

Fairbank Canning Co. v. Metzger, 118 N. Y. 260.

Marsh v. Low, 55 Ind. 271.

Trumbull v. O'Hara, 71 Conn. 172.

§ 221. *Vendor Guilty of Fraud:*

As previously stated, fraud permits the injured party to rescind.

Sparling v. Marks, 86 Ill. 125.

Nelson v. Martin, 105 Pa. St. 229.

Gates v. Bliss, 43 Vt. 299.

Pence v. Langdon, 99 U. S. 578.

Baker v. Lever, 67 N. Y. 304.

§ 221a. *The Contract Providing that Vendee May Return:*

This, of course, is a mere "sale and return," or a sale to be "satisfactory," and has been sufficiently considered, previously (§§ 139, 140).

§ 222. *Action for Breach of Title:*

Although the seller's engagement as to his ability to convey a valid title is an implied warranty (or condition), nevertheless, on account of other questions connected with it, action for its breach deserves separate notice.

The vendor's implied warranty of title means that he agrees to convey a clear and perfect ownership; consequently if there are incumbrances upon the goods, such as mortgages or liens, or if the goods are owned by another, there is a breach of the warranty.

Such a breach permits the vendee to rescind the sale, and to recover his purchase-money, if paid, together with interest. He may, in addition, keep the goods, pay off the claims connected with them, if in the nature of liens, and recover from the vendor the amount thus paid. In a Massachusetts case (*Grose v. Hennessey*, 13 Allen, 389), it was said that the vendee could recover an amount equal to the difference between the value of the title he received and the value of the title he contracted to receive.

Linton v. Porter, 31 Ill. 107.

Dean v. Mason, 4 Conn. 428.

Harper v. Dotson, 43 Iowa, 232.

Matheny v. Mason, 73 Mo. 677.

§ 223. *Time of Breach — Implied Warranty of Title:*

An important question connected with implied warranty of title is, When is the warranty broken,—at the time of the sale, or not until the vendee has been dispossessed by the lawful owner? The analogies of covenants of seisin and covenants of warranty, common to sales of realty, are cited by those who say that there is no breach, and therefore no right of action by the vendee against the vendor, until the vendee has been disturbed in his possession, or he has been forced to satisfy valid claims against the goods. No dogmatic assertion can settle this question. As a theory it will, probably, remain unsettled, although, as a more satisfactory commercial rule, it is contended that the first view, namely, that the warranty is broken at the time of the sale, is to be preferred. The first division of the following cases illustrate this view; the second division represent the view that the warranty is not broken until the purchaser has been disturbed:

(1) Broken at Time of Sale.

Grose v. Hennessey, 13 Allen, 389.

Matheny v. Mason, 73 Mo. 677.

McGiffin v. Baird, 62 N. Y. 329.
Word v. Cavin, 1 Head (Tenn.), 506.
Perkins v. Whelan, 116 Mass. 542.

(2) Not Broken at Time of Sale.

Wanser v. Messler, 29 N. J. L. 256.
Case v. Hall, 24 Wend. 102.
Linton v. Porter, 31 Ill. 107.
Randon v. Toby, 11 How. 493.
Krnmbhaar v. Birch, 83 Pa. St. 426.

§ 224. *Breach of Express Warranty:*

In general, upon the breach of an *express* warranty, the vendee's remedy is an action for damages. Theoretically, this is his *only* remedy; but, in practice, so many states permit a return that whether it be the sole remedy or not depends upon the jurisdiction. Even in those jurisdictions which permit the vendee to return the goods, the right of return is an *additional* remedy, and the vendee may elect to keep the goods and sue upon the breach. Acceptance of the goods by the vendee does not affect his right to sue, since it is a familiar doctrine that "the warranty survives the acceptance." Notice is not necessary to the suit; neither, moreover, is it requisite that the price should have been paid. Even in case the vendee is sued for the price, he may set off or counter-claim the breach of the warranty against the vendor's action for the price. Should he not do so, however, he still has his independent action, although he did not interpose the defense to the vendor's claim. If the transfer of the title be dependent, however, upon prepayment, the price must be paid before action is brought, since the action implies that the title to the property is, or was, vested in the plaintiff. In actions for breach of warranty, however, it is not necessary to allege *scienter* of the vendor.

The defense of breach of warranty where the vendee is sued upon a note given for the price is not available, however, to a surety on the note, since that defense be-

longs to the principal alone. That the sale, however, has been *rescinded* on account of a breach is available to the surety.

Stockton Savings Society v. Giddings, 96 Cal. 84, 21 L. R. A. 406.

§ 225. *Contract of Warranty a Personal One:*

That the contract of warranty is a personal one to the contracting parties, and cannot be taken advantage of by others not in privity, needs no citations in support, it being elementary doctrine. A strange decision, however, was rendered in the case of *Landa v. Lattin* (19 Tex. Civ. App. 246, 46 S. W. R. 48), where it was distinctly said that the assignee of a bill of lading, with draft, was liable, upon receiving payment for the draft, for the return of the money, in case of breach of warranty by the vendor. This decision has been recently followed in the South Carolina case of *Finch v. Gregg* (35 S. E. R. 251). This is, indeed, new doctrine, and entirely out of line with the recognized principles of the law. See this last case in 49 L. R. A., and note, there, reviewing the authorities.

§ 226. *Warranties, Express and Implied:*

An action for damages exists for breach of an *implied* warranty as well as for breach of an *express* warranty. It is to be remembered that the right to *return* for breach of an implied warranty is merely an *accumulative* one. The vendee may keep the goods and sue upon his warranty.

§ 227. *Measure of Damages:*

In actions upon the warranty, the measure of damages is the difference between the market value of the goods *as delivered* and the market value if they had been *as warranted*. This is *not* the same thing in every case, although it *may* be in *some* instances, as the difference between the market value *as delivered* and the *contract price*, since, if the vendee purchased the goods *as war-*

ranted below the market value, he is entitled to the profits of his bargain. Kansas and Colorado, however, and possibly other states, have adopted this second rule as the measure of damages.

The former rule, as stated, is the prevailing rule as to *general damages* for breaches of both express and implied warranties. There may be, however, *consequential* or *special* damages in connection with actions for breach of warranty, as in actions, generally, for breaches of contract, and a few principles relating to such damages are stated in "Part VII."

Richardson v. Grandy, 49 Vt. 22.
Ferris v. Comstock, 33 Conn. 513.
Shupe v. Collender, 56 Conn. 489.
Brown v. Bigelow, 10 Allen, 242.
Eyers v. Haddem, 70 Fed. R. 648.
Ingraham v. Union R. Co. (R. I., 1896), 33 Atl. R. 875.
Kimball v. Vorman, 35 Mich. 310.
Wolcott v. Mount, 36 N. J. L. 262, 38 id. 496.
Aultman v. Wheeler, 49 Iowa, 647.
Cothers v. Keever, 4 Pa. St. 168.
Wheelock v. Berkeley, 138 Ill. 153.
Crystal Palace Flouring-Mill Co. v. Butterfield (Colo., 1900), 61 Pac. R. 479.
Dushane v. Benedict, 120 U. S. 639.
Hooper v. Story, 151 N. Y. 171.
Aultman v. Mickey, 41 Kan. 348.
Frick Co. v. Falk, 50 Kan. 644.
English v. Hanford, 75 Hun, 428.

§ 228. *Fraud:*

In case of fraudulent representation the vendee may rescind the sale, or he may, if he prefers, keep the goods and bring action for the fraud (action for *deceit*, or action *on the case*), independently of the contract; or he may sue (*assumpsit*) for damages upon the implied contract. If he rescinds, he can recover the price, if paid, together with interest. The measure of damages, in case he keeps the goods and brings action (either in tort or in contract,

as above), is the same as upon action for breach of warranty, consequential damages, also, being, generally, favored.

If the vendee has not paid for the goods he may refuse to pay, and, upon the vendor's action for the price, the vendee may set up, generally, the fraud in defense, as a mitigation of the vendor's claim.

Murray v. Jennings, 42 Conn. 9.

Vail v. Reynolds, 118 N. Y. 297.

South, etc. R. Co. v. Guest, 34 Fed. R. 628.

Jeffrey v. Bigelow, 13 Wend. 518.

Smith v. Bolles, 132 U. S. 125.

Dushane v. Benedict, 120 U. S. 639.

PART VII.

PRINCIPLES RELATING TO DAMAGES.

§ 229. In order to explain more fully certain principles connected with actions for damages, especially in their relation to remedies for the breach of contracts of sale, a few fundamental rules are here appended. No attempt is made to give even an outline of the subject in general, since it is a special and a very important branch of the law, and should be studied by means of the separate treatises. The student is particularly referred to Sedgwick's Damages (3 vols., 8th ed., 1891), a valuable authority.

§ 229a. *Damages a Compensation:*

The fundamental principle of the doctrine of damages is that the person who has suffered a loss by the default of another should be placed in the same position, as far as money can so accomplish, as if the contract had been duly performed.

United States *v.* Smith, 94 U. S. 214.

Mason *v.* Hawes, 52 Conn. 12.

McMurtry *v.* Blake, 45 Neb. 213.

Allison *v.* Chandler, 11 Mich. 548.

§ 230. *Right to Damages:*

Before one is lawfully entitled to recover damages, he must show that there has been an injury (default in contract), a loss caused by such wrong, and a reasonable estimate or computation of such loss. The wrong and the loss sustained must be of the nature of cause and

effect, and the loss must be the natural and approximate, and not the remote and speculative, consequences of the injury.

Fairchild v. Rogers, 32 Minn. 269.

Warwick v. Hutchinson, 45 N. J. L. 61.

§ 231. *Classification of Damages:*

Damages may be conveniently classified as follows:

1. Direct and Consequential.
2. General and Special.
3. Proximate and Remote.
4. Liquidated and Unliquidated.
5. Nominal and Substantial.
6. Compensatory and Punitive (Exemplary).

Direct or immediate damages are such damages as result from an injurious act without the influence of any intervening cause.

Consequential damages (resulting damages, indirect damages) result from some intervening event, which depends, however, upon the same original cause as the direct damages.

General damages are those damages which by necessity or by implication of law result from an injurious act. They are awarded in reasonable discretion, without proof of any particular loss. In breach of contract, general damages are such as naturally follow the breach. They are presumed to follow necessarily from the breach itself.

Special damages are also the *natural* result of the breach, but they are not the *necessary* result. They are losses which belong to the circumstances of each particular case. Special or consequential damages must be laid in the declaration, if the plaintiff is to recover. This is necessary in order that the defendant may have due notice of the damage for which he is alleged to be responsible.

Smith v. St. Paul, etc. R. Co., 30 Minn. 172.

Wallace v. Ah Sam, 71 Cal. 197, 60 Am. R. 534.

Bristol Mfg. Co. v. Gridley, 28 Conn. 201.
Roberts v. Graham, 6 Wall. 578.
Peshine v. Shepperson, 17 Grat. 472, 94 Am. Dec. 468.

§ 232. General Rule of Damages:

One who is guilty of a breach of contract is responsible for only such damages as are the natural results of the breach.

Bagley v. Cleveland Rolling Mill Co., 21 Fed. R. 159.
Union Pacific R. Co. v. Shook, 8 Kan. App. 710.
Benton v. Fay, 64 Ill. 420.
Hadley v. Baxendale, 9 Exch. 353.

In the leading English case of *Hadley v. Baxendale*, it is said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive should be such as may fairly and reasonably be considered either arising naturally . . . or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

Although the form of this rule has been adversely criticised, yet the principle involved in it is generally applied. Thus where the circumstances of the particular use were not communicated to the vendor, he was not held liable in special damages, while, on the other hand, when the vendor did know that the goods were ordered for a certain purpose, and agreed to supply the goods for that purpose, he was held liable for the damages resulting upon his breach, because they were said to be reasonably within the contemplation of the parties. Profits to be derived from a resale, such intended resale being known to the vendor, have likewise been held recoverable as special damages. Of course, in all such cases, the loss must be a natural and a proximate one, and not such as is remote or merely speculative.

Daugherty v. Am. Union Tel. Co., 75 Ala. 168, 51 Am. R. 435.
Stewart v. Power, 12 Kan. 600.

Milburn v. Belloni, 39 N. Y. 53.
Devlin v. New York, 63 N. Y. 26.
Fessler v. Love, 48 Pa. St. 407.
Pittsburg Coal Co. v. Foster, 59 Pa. St. 365.
Jordan v. Patterson, 67 Conn. 473.
Blue Grass Cordage Co. v. Luthy, 98 Ky. 583, 33 S. W. R. 835.
Gas Co. v. Glass Co., 56 Kan. 614.

§ 233. *Knowledge of Intention to Resell:*

The courts are not agreed as to the sufficiency of mere knowledge of the special purpose of resale. Some say that where the damages are not the usual and natural ones, but depend, rather, upon the special circumstances of the case, the contracting party, in order to be held liable, must, in addition to his knowledge of the intention of the other party, have agreed to assume the special liability. The Illinois and Michigan cases cited below follow this last rule. The other cited cases hold that the vendor is, generally, responsible if he *knew* for what purpose the goods were ordered.

Snell v. Cottingham, 72 Ill. 161.
McKinnon v. McEwan, 48 Mich. 106, 42 Am. R. 458.
Hubbard v. Rowell, 51 Conn. 423.
Lewis v. Rountree, 79 N. C. 122, 28 Am. R. 309.

§ 234. *General Contracts of Sale:*

In general, however, the broad rule seems to be that in most contracts of the sale of goods, if the vendor is to be held responsible for any other damages than those which naturally and approximately flow from the breach, there must be some evidence to show that he assumed such liability.

Cuddy v. Major, 12 Mich. 368.
Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487.

§ 235. *Injured Party's Duty:*

In all injuries received by the wrong of another, it is the injured party's duty to lessen the damage by every

reasonable precaution. In case of the vendor's default, the vendee must try to purchase the goods elsewhere, otherwise he cannot hold the seller liable for any special damages which might follow their non-delivery. He may be able to purchase the desired goods elsewhere, at even a lower price. The circumstances of each case must govern his actions. It is his duty, in diminishing his loss, to observe the care and diligence of a reasonable man.

Warren v. Stoddart, 105 U. S. 230.

Roberts v. White, 73 N. Y. 380.

Laurence v. Porter, 63 Fed. R. 62.

St. Louis R. Co. v. Ritz, 33 Kan. 404.

Kelsey v. Remer, 43 Conn. 129.

French v. Vining, 102 Mass. 132, 3 Am. R. 440.

§ 236. *Breach of Warranties:*

What has been said concerning consequential damages, with reference to the breach of contracts in general, that is, referring to the performance of the contract, applies, also, to breach of warranties. While the general measure of damages is the difference between the value of the article as delivered and its value if as warranted, yet special or consequential damages may often be recovered. If the article is warranted to be of a certain quality, and is to be used for a special purpose requiring the quality warranted, and, upon breach of such warranty, injuries follow as a natural result, then consequential damages are recoverable. Each case, of course, depends upon its own circumstances and its particular evidence.

Milburn v. Belloni, 39 N. Y. 53.

Maynard v. Maynard, 49 Vt. 297.

Sherrod v. Langdon, 21 Iowa, 519.

Broquet v. Tripp, 36 Kan. 700.

Osborne & Co. v. Ehrhard, 37 Kan. 413. (Where expense occurred in defending action to a note given for a warranted machine, note indorsed to third person, was held consequential damages.)

Beeman v. Banta, 118 N. Y. 538.

§ 237. *Proximate and Remote Damages:*

Proximate damages are such as are usual or natural in consequence of the injury; such as may reasonably be expected to follow as a result. They are immediate damages. Remote damages are those damages which follow from such accidental or unanticipated intervening circumstances that they could not be reasonably expected to result from the breach. Damages which are not connected naturally and proximately with the wrong complained of are said to be too remote, and for such no recovery can be had. Likewise damages that are uncertain, contingent, although possible, but conjectural or prospective, such as possible profits, without, however, it appearing that they would follow as a natural or proximate consequence, are too remote for recovery. The possibilities of varying circumstances are infinite, and the line between proximate and remote damages is, at times, very indistinct. The rule, however, as to remote damages remains, and it must be interpreted in accordance with the facts of each case. When fraud has caused the loss, then the line between proximate and alleged remote damages is less strictly drawn.

Western Union Co. v. Crall, 39 Kan. 580.

Paint Co. v. Glover, 47 Kan. 75.

Lewis v. Hartford Dredging Co., 68 Conn. 221.

Olmstead v. Burke, 25 Ill. 86.

Sherman Center Town Co. v. Leonard, 46 Kan. 354.

Friedland v. McNeil, 33 Mich. 40.

Griffin v. Colver, 16 N. Y. 489.

Anvil Min. Co. v. Humble, 153 U. S. 540.

Milwaukee R. Co. v. Kellogg, 94 U. S. 469.

Smith v. W. U. Tel. Co., 83 Ky. 104, 4 Am. St. R. 126.

Sharon v. Mosher, 17 Barb. 518.

Thompson v. Burgey, 36 Pa. St. 403.

§ 238. *Further Classification:*

Damages are further classified as liquidated and unliquidated; nominal and substantial; compensatory and

punitive. The fundamental idea of damages is compensatory, as we have seen. In cases of tort, however, where the wrong is inflicted with malice, punitive or exemplary damages ("smart money") are sometimes given as a punishment or an example. This question, however, does not concern our subject. Liquidated damages are such as are ascertained or agreed to as to amount, while unliquidated damages are such as have not as yet been determined or ascertained. Nominal damages mean a small or trifling sum given merely in recognition of the right of action, but denying any measurable loss. Upon any breach of a contract, whether there be loss or not, the plaintiff is entitled to sue, and the law recognizes his right to recover, in all cases, the breach being shown, nominal damages, at least. Substantial damages are such as are awarded to compensate the loss actually sustained.

Dow v. Humbert, 91 U. S. 294.

Wallis v. Keeney, 88 Ill. 370.

Coffin v. State, 144 Ind. 578.

Rosenbaum v. McThomas, 34 Ind. 331.

§ 239. *Interest Money — Costs:*

In connection with damages, interest money is sometimes allowed as a part thereof. This is done in connection with liquidated damages. Thus, if the vendor sues for and recovers the price, this being a fixed or liquidated sum, he is entitled to legal interest from the date of the agreed payment. Likewise, if the vendee can fix the amount due as damages, by reference to market prices at the time of the vendor's breach, he is entitled to interest. These, however, are only general rules, and the courts are not agreed upon the subject of interest. In the English courts, interest is seldom recovered.

The general rule is that expenses of the suit, other than the ordinary costs or court fees, are not recoverable. Each

party must, as a rule, pay his own attorney's fees. There may, of course, be a stipulation in a contract that attorneys' fees may be recovered in case of suit, and statutes may provide, in certain cases, for such recovery. With reference to expenses of litigation with third persons, however, such expenses resulting as the natural and proximate consequence of the wrong of the defaulting party, the general rule is that such expense is a part of the damage incurred, and, therefore, may be recovered.

White v. Miller, 78 N. Y. 393, 395.

Gray v. Hall, 29 Kan. 704, 32 id. 568.

Hewes v. German Fruit Co., 106 Cal. 441, 39 Pac. R. 858.

Warren v. Cole, 15 Mich. 265.

Mason v. Hawes, 52 Conn. 12.

Day v. Woodworth, 18 How. 363.

Henry v. Davis, 123 Mass. 345.

Osborne & Co. v. Ehrhard, 37 Kan. 413.

Dubois v. Hermance, 56 N. Y. 673.

APPENDIX.

APPENDIX I.

ENGLISH SALE OF GOODS ACT, 1893.

(56 and 57 Victoria, c. 71.)

One of the most notable and successful attempts to codify the principles of existing law is illustrated in the English Sale of Goods Act, which is here appended. The bill was originally drafted by Judge Chalmers, in 1888. It was subjected to the most searching criticism of England's ablest jurists, and also of special committees from both houses of Parliament. After various changes and amendments, it was finally passed in 1893, and went into effect the following year. With but few exceptions it reproduces the previous principles connected with the sale of personal property as laid down by the common law and the Statute of Frauds. It is, therefore, in itself, a valuable digest of the principles of the law of sales.

AN ACT

For Codifying the Law Relating to the Sale of Goods.

(20th February, 1894.)

Be it Enacted, etc.

PART I.

FORMATION OF THE CONTRACT.

Contract of Sale.

1. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the

price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract.

3. Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

4. (1) A contract for the sale of any goods to the value of ten pounds or upwards shall not be enforceable by

action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4) The provisions of this section do not apply to Scotland.

Subject-Matter of Contract.

5. (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6. Where there is a contract for the sale of specific

goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

The Price.

8. (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9. (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties.

10. (1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of

sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2) In a contract of sale "month" means *prima facie* calendar month.

11. (1) In England or Ireland —

(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

(c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3) Nothing in this section shall affect the case of any conditional warranty, fulfillment of which is excused by law by reason of impossibility or otherwise.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is —

(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(3) An implied warranty that the goods shall be free from any charge or incumbrance in favor of any third party, not declared or known to the buyer before or at the time when the contract is made.

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

14. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: —

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there

is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by Sample.

15. (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample—

(a) There is an implied condition that the bulk shall correspond with the sample in quality:

(b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:

(c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II.

EFFECTS OF THE CONTRACT.

Transfer of Property as Between Seller and Buyer.

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17. (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertain-

ing the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4. When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein passes to the buyer:

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5. (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

19. (1) Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer,

or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss that might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

Transfer of Title.

21. (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of

the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Provided also that nothing in this Act shall affect —

(a) The provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b) The validity of any contract of sale under any special common-law or statutory power of sale or under the order of a court of competent jurisdiction.

22. (1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2) Nothing in this section shall affect the law relating to the sale of horses.

(3) The provisions of this section do not apply to Scotland.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

24. (1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3) The provisions of this section do not apply to Scotland.

25. (1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

26. (1) A writ of *fieri facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to indorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3) The provisions of this section do not apply to Scotland.

PART III.

Performance of the Contract.

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

29. (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf: provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30. (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31. (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32. (1) Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

34. (1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this sec-

tion shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

38. (1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act —

(a) When the whole of the price has not been paid or tendered;

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.

(2) In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

39. (1) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law —

(a) A lien on the goods or right to retain them for the price while he is in possession of them;

(b) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;

(c) A right of resale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-

extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

Unpaid Seller's Lien.

41. (1) Subject to provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been under such circumstances as to show an agreement to waive the lien or right of retention.

43. (1) The unpaid seller of goods loses his lien or right of retention thereon —

(a) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in Transitu.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

45. (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession

of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46. (1) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller.

Resale by Buyer or Seller.

47. Subject to the provisions of this Act the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.

48. (1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*.

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* resells the goods, the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer

making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

49. (1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50. (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be

ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer.

51. (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52. In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be

supplementary to, and not in derogation of, the right of specific implement in Scotland.

53. (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may —

(a) Set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) Maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI.

SUPPLEMENTARY.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

56. Where, by this Act, any reference is made to a reasonable time, the question, What is a reasonable time? is a question of fact.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

58. In the case of a sale by auction —

(1) Where goods are put up for sale by auction in lots each lot is *prima facie* deemed to be the subject of a separate contract of sale:

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid:

(3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer:

(4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not

otherwise, the seller, or any one person on his behalf, may bid at the auction.

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect to any such thing, right, title, or interest.

61. (1) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3) Nothing in this Act or in any repeal affected thereby shall affect the enactment relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a

contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

62. (1) In this Act, unless the context or subject-matter otherwise requires,—

“Action” includes counter-claim and set-off, and in Scotland condescendence and claim and compensation:

“Bailee” in Scotland includes custodier:

“Buyer” means a person who buys or agrees to buy goods:

“Contract of sale” includes an agreement to sell as well as a sale:

“Defendant” includes in Scotland defender, respondent, and claimant in a multiple-pounding:

“Delivery” means voluntary transfer of possession from one person to another:

“Document of title to goods” has the same meaning as it has in the Factors Acts:

“Factors Acts” mean the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same:

“Fault” means wrongful act or default:

“Future goods” mean goods to be manufactured or acquired by the seller after the making of the contract of sale:

“Goods” include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale:

“Lien” in Scotland includes right of retention:

“Plaintiff” includes pursuer, complainer, claimant in

a multiple-poinding and defendant or defender counter-claiming:

“Property” means the general property in goods, and not merely a special property:

“Quality of goods” includes their state or condition:

“Sale” includes a bargain and sale as well as a sale and delivery:

“Seller” means a person who sells or agrees to sell goods:

“Specific goods” means goods identified or agreed upon at the time a contract of sale is made:

“Warranty” as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2) A thing is deemed to be done “in good faith” within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4) Goods are in a “deliverable state” within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

63. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

64. This Act may be cited as the Sale of Goods Act, 1893.

APPENDIX II.

THE NEW YORK FACTORS ACT, 1830.

FACTORS ACTS.

In the main portion of the text (§ 11), reference was made to the fact that statutes known as "Factors Acts" have been enacted in a number of our states, for the purpose of enlarging the power of factors, and, also, for the protection of *bona fide* purchasers, who depend upon the fact of the possession of the goods by the factor as an assurance that he is the owner of the same or, at least, that he has full authority to convey a valid title. These statutes vary somewhat in the different states, but they all have the same object in view, although some of them do not go as far as the others. The New York statute has been made a model for similar statutes in some of the other states, and since it is, thus, a type of such acts, it is appended here, in full, for reference.

(L. 1830, c. 179.)

An Act for the Amendment of the Law Relative to Principals and Factors or Agents.

SECTION 1. After this Act shall take effect, every person in whose name any merchandise shall be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon, (1) for any money advanced, or negotiable security given by such consignee, to or for the use of the person in whose name such shipment shall have been made; and

(2) for any money or negotiable security received by the person in whose name such shipment shall have been made, to or for the use of such consignee.

SEC. 2. The lien provided for in the preceding section shall not exist where such consignee shall have notice by the bill of lading or otherwise, at or before the advancing of any money or security by the person in whose name the shipment shall have been made, that such person is not the actual and *bona fide* owner thereof.

SEC. 3. Every factor or other agent, intrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof.

SEC. 4. Every person who shall hereafter accept or take any such merchandise in deposit from any such agent, as a security for any antecedent debt or demand, shall not acquire thereby, or enforce any right or interest in or to such merchandise or document, other than was possessed or might have been enforced by such agent at the time of such deposit.

SEC. 5. Nothing contained in the two last preceding sections of this Act shall be construed to prevent the true owner of any merchandise so deposited from demanding or receiving the same, upon the repayment of the money

advanced, or on restoration of the security given, on the deposit of such merchandise, and upon satisfying such lien as may exist thereon in favor of the agent who may have deposited the same; nor from recovering any balance which may remain in the hands of the person with whom such merchandise shall have been deposited, as the produce of the sale thereof, after satisfying the amount justly due to such person by reason of such deposit.

SEC. 6. Nothing contained in this Act shall authorize a common carrier, warehouse-keeper, or other person to whom merchandise or other property may be committed for transportation or storage only, to sell or hypothecate the same.

SEC. 7. (Repealed, Laws 1886, c. 593.)

SEC. 8. Nothing contained in the last preceding section shall be construed to prevent the court of chancery from compelling discovery, or granting relief upon any bill to be filed in that court by the owner of any merchandise so intrusted or consigned, against the factor or agent by whom such merchandise shall have been applied or sold contrary to the provisions of the said section, or against any person who shall have been knowingly a party to such fraudulent application or sale thereof; but no answer to any such bill shall be read in evidence against the defendant making the same, on the trial of any indictment for the fraud charged in the bill.

APPENDIX III.

FORMS.

In the following pages are presented forms of a "bill of sale" and certain "documents of title," the latter including a railroad bill of lading, a "non-negotiable" bill of lading as issued by an express company, and warehouse receipts. The documents of title have been copied from forms used by well known companies, but the student knows, of course, that there is no *fixed* form for such documents, since the specific terms of the contract of carriage or of storage vary with different companies. A bill of sale (a formal contract) differs, it is to be noted, from a mere "receipt" for money paid for purchased goods, and, also, from an "invoice" (which is an itemized statement of goods sold, together with prices annexed), although the latter is popularly designated as a "bill."

Bill of Sale of Personal Property.

Know all men by these presents, that — —, in consideration of — dollars paid by — —, the receipt whereof is hereby acknowledged, do — hereby grant, sell, transfer and deliver unto the said — — the following goods and chattels, viz.: [Here insert description.]

To have and to hold, all and singular, the said goods and chattels, to the said — — and — executors, administrators and assigns forever. And the said grantor— hereby covenant with the said grantee— that — the lawful owner— of the said goods and chattels; that they are free from all incumbrances; that — ha— good right to sell the same as aforesaid, and that — will warrant and

defend the same against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said grantor— ha— hereunto set — hand—, this — day of —, A. D. 19—. — — —.

Signed, sealed and delivered in presence of
— — —
— — —

Bill of Lading.

No. — — —, — — —, 190—.

Received from — — — the following described packages, in apparent good order (contents and value unknown), consigned and marked and numbered in the margin, to be transported upon the conditions expressed herein over the line of this road to — — station and delivered in like good order to the consignee or owner at said station, if upon the line of this road, or to some connecting carrier, if said station is upon a connecting line and beyond the line of this road, whose line may be considered a part of the route to the place of destination of said freight, it being distinctly understood that the responsibility of each carrier shall not begin until it receives the freight from the consignor or from a connecting carrier, and shall cease when it delivers the same to a connecting carrier or to the consignee. Property to be delivered at a station where there is no regular railroad station agent, or at private or other sidings, shall be considered delivered to and at risk of owner when and as soon as left on platform or on side-track in car. The — — Railway Company guarantees, upon the conditions expressed herein, that the rate for transportation from the place of shipment to — — shall not exceed the rate noted on this bill of lading and charges advanced by them, provided that the contents of said packages are properly represented in specific and not in general terms upon the receipt (original and duplicate), and further provided that the property below described is not diverted en route from the line or lines of carriers to which it may be consigned by The — — Railway Company, at the instance or through the agency of the shippers or consignees, either or both of them, without the consent of The — — Railway Company. This contract is made also for the separate benefit of each connecting carrier and upon and is subject to the following

CONDITIONS.

The carrier will not receive on any train Gold or Silver Coin, Bullion or Manufactured Articles of Gold and Silver, Jewels and Watches, Paintings or Pictures, Statuettes, Bank Bills, Drafts, Notes, Bonds, Stocks, Deeds, Contracts, Mail Matter, Val-

uable Papers or other Writings, and no Agent or Conductor is authorized to take charge of the same; and if shipped secretly or with other property, unknown to the Officers and Agents of the carrier, the carrier will not be responsible in case of loss or damage from any cause whatever.

When the contents of packages are not properly represented by the shipper, it is agreed that upon the actual contents of the packages the published rate of the several carriers over whose lines the goods must pass to destination is the only rate guaranteed.

When the words "Owner's Risk" or the letters "O. R." are noted on this Bill of Lading, the shipper assumes the risk of all loss or damage to the property in the course of transportation, and in any event not to exceed the declared value herein stated, if any.

When this Bill of Lading bears a notation showing that the valuation of the freight is released to any amount, it is agreed that the value of the freight does not exceed such amount and that any carrier which may be liable for loss or damage of the freight shall not be bound to pay more than such amount.

When the words "Loaded by Shipper" or "Shipper's Count" are noted on this Bill of Lading, it is an acknowledgment on the part of the shipper that the carrier is not liable directly or indirectly for loss or damage arising from improper stowage or insufficient packages, or for any discrepancy in count or quantity.

No carrier shall be responsible for loss or damage of any of the freight shipped unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this notice must be given within thirty hours after the arrival of the same at destination.

No carrier shall be responsible for loss or damage to property unless notice in writing of such loss or damage is given to the delivering carrier within thirty hours after delivery.

No carrier shall be responsible for the loss of packages the contents of which are unknown, for the leakage of any kind of Liquids, breakage of any kind of Glass, Carboys of Acid or articles packed in glass, Stoves or Stove Furniture, Castings, Machinery, Carriages, Furniture, Musical Instruments of any kind, Packages of Eggs, or for rust of Iron and Iron Articles, or for the condition of baling of or loss or damage on Hay, Hemp, Cotton, or any other article whose bulk renders it necessary to transport on open cars, or for damage to perishable property of any kind occasioned by delays from any cause or change of weather, nor for any loss of weight of Grain, or Coffee in bags, or Rice in tierces, nor for loss of Nuts in bags, or Lemons or Oranges in boxes not covered by canvass, or for loss or damage to Freight occasioned by providential causes, by fires or negligence, or for loss of Flour or any other property caused by bad or insufficient cooperage, or for loss or damage on the lakes or rivers. It is further agreed that for all loss or damage occurring in transit of Freight, the legal remedy shall be against only the particular carrier in whose custody the said freight may actually be at the time of the happening thereof. In the event of the loss of any property for which any carrier may be responsible under this Bill of Lading, the value or cost of the same at the point and time of shipment is to govern the settlement, unless the valuation is otherwise released or stated on this Bill of Lading.

All packages subject to charge for cooperage if necessary.

No carrier shall be responsible for loss or damage to Flat Cotton by fire from any cause whatever while in transit or at stations.

No carrier shall be responsible for accident or delays from causes which could not be reasonably anticipated or avoided.

No carrier shall be responsible for delay, loss or damage caused by or on account of strikes, riots or mobs.

All freight shall be subject to transfer en route, as the necessities or convenience of any carrier requires.

The owner or consignee shall pay charges as per specified rates upon the goods as they arrive.

In consideration of the reduced rates herein given on goods packed in bales, it is agreed that each carrier over whose line the said goods shall pass in course of transportation is released by the shipper of said goods for all claims for damage by chafing in transit.

Freight must be removed from the station during business hours on the day of its arrival at destination, or shall be stored at the owner's sole risk and expense.

All carload freight shall be subject to a minimum charge for trackage and rental of \$1.00 per car for each twenty-four hours' detention or fractional part thereof after the expiration of twenty-four hours from its arrival at destination, and the carrier shall have the same lien and to the same extent upon the property for such charge as for transportation charges.

This Bill of Lading must be presented without alteration or erasure.

The original Bill of Lading only is transferable.

Copies are furnished for the information of those concerned, but are otherwise valueless, except as evidence that a Bill of Lading has been issued.

Agents have no authority to issue more than one original Bill of Lading, and only for or to cover goods actually received for transportation.

Each and every covenant, provision and exemption in this Bill of Lading shall apply to and inure separately in favor of each and every connecting carrier which may transport said packages or goods to destination as fully and to the same extent as the same applies to and inures in favor of the initial carrier issuing this Bill of Lading, and as though each such connecting carrier were specifically named herein in the place and stead of such initial carrier.

SUBJECT TO MINIMUM CHARGE.

Shippers will take notice that when goods are consigned "To Order," the name and address of some party or parties to whom notice of arrival at destination may be sent must be given, or the goods will be subject to cartage or warehouse charges.

Non-negotiable Bill of Lading.

—, —, 190.

Received of —, —, —, said to contain —, and represented to be of the value of — dollars, and marked —. And in consideration of the freight charges therefor, the said — Express Company undertakes to forward the same to the point nearest to destination reached by this company, only. And it is hereby expressly agreed:

1. That the said — Express Company shall not be liable for any loss of, or damage to, the property above mentioned, which shall occur while the same is in possession of any other carrier; nor for any loss of, or damage to, said property exceeding the sum of \$50.00 (which is the value of the property agreed upon as the basis of freight charges, and to which charges are graduated) unless the just and true value thereof is otherwise herein stated; nor in any event shall the said company be liable for more than the true value of said property; nor shall said company be liable for any loss or damage from the acts of God, or the public enemies, or the acts or restraints of governments, mobs, riots, insurrections, or from any of the dangers incident to a time of war; nor for damage or loss by fire, unless such fire is caused by the negligence of this company or the negligence of its own servants; nor for any property or thing unless properly packed and secured for transportation; nor for fragile articles unless so marked upon the package containing the same, nor for any article consisting of, or contained in, glass.

2. If any sum of money, besides the charges for transportation, is to be collected from the consignee on delivery of the property described herein, and the same is not paid within thirty days from this date, it is hereby agreed that the — Express Company may, at its option, at the expiration of that time return the said property to the shipper subject to the conditions of this contract, and the shipper shall pay the charges for transportation both ways. And it is further agreed that the liability of the — Express Company for such property while in its possession for the purpose of making such collection shall be that of a warehouseman only.

3. And it is further stipulated and agreed, in consideration of the rate of freight to be charged, that the — Express Company shall not be required to make free delivery of the property above mentioned, to the consignee at any station where no free delivery service is maintained by said company; nor at any station where such free delivery service is maintained, beyond the delivery limits established by the — Express Company at the date hereof, unless expressly agreed upon and an additional compensation is paid therefor.

4. And it is further agreed that the — Express Company shall not be liable for any claim of any nature whatever arising out of the receipt of the property above mentioned, unless such claim is presented in writing within sixty days from the date of loss or damage, in a statement to which a copy of this contract shall be annexed; and the shipper and owner hereby agree that all of the stipulations and conditions in this contract contained shall extend and inure to the benefit of each and every person or company to whom the — Express Company may intrust or deliver the above described property for transportation, storage or delivery, and shall define and limit the liability therefor of such other person or company. And by the acceptance of this bill of lading by the consignor, or by the person delivering the property to the — Express Company, the consignor and owner of the property shall become bound by all of the foregoing terms and conditions.

For the — Express Company.

 Read this bill of lading.

—, —, Agent.

Warehouse Receipts.

Form 1.

No. 67.

MARCH 31, 1894.

Received of A. B. six hundred and ninety-nine $\frac{4}{5}$ bushels of wheat in store, subject to our charges. Fire at owner's risk.

(Signed) C. D.
—

Form 2.

CHICAGO, SEPT. 24, 1892.

This certifies that we have received in store from A. B. two thousand bush. No. 2 hard wheat, subject to the order hereon of A. B., and the surrender of this receipt and payment of charges. It is hereby agreed by the holder of this receipt that the articles herein mentioned may be stored with others of the same grade and quality. Loss by fire or heating at owner's risk. This is stored at $\frac{1}{2}$ cent per bush., first month, and $\frac{1}{2}$ cent per bush., second month, and each additional month or fraction thereof.

(Signed) C. D., Manager.

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